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SUPREME COURT OF THE UNITED STATES

October Term, 1982

Supreme Court, U.S.
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ASTRID GALINDO SARDOZ and MARIA SOTO VDA. DE TALAMANTES as co-personal representatives of the Estate of BERNARDO TALAMANTES, a/k/a HECTOR M. BAYLON, deceased,

Appellants,

vs.

KENT NOWLIN CONSTRUCTION COMPANY,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW MEXICO

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether the exclusive remedy provision of the New Mexico Workmen's Compensation Act, construed by the New Mexico Supreme Court to deprive non-resident alien dependents of any relief or compensation for the negligent death of a worker, violates due process, equal protection, or federal supremacy as guaranteed by the United States Constitution?

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Supreme Court of the State of New Mexico in this case is reproduced in full in Appendix C, infra.

JURISDICTION

Astrid Galindo Sardoz and Maria Soto Vda. de Talamantes appeal from the decision of the Supreme Court of the State of New Mexico, denying plaintiffs recovery under the state's wrongful death statute.

The decision appealed from was issued on January 14, 1983. The Notice of Appeal was filed in both the Supreme Court of New Mexico and the New Mexico Court of Appeals (the court possessed of the record) on April 8, 1983.

The federal constitutional questions raised herein were presented to the New Mexico Supreme Court and rejected by that Court. See n.1, infra. Therefore, the jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

Title 28 U.S.C. § 2403(b) may be applicable in this case; as a result service is being made on the Attorney General of the State of New Mexico.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The fourteenth amendment to the United States Constitution provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The supremacy clause of the United States Constitution, U.S. Const. art. VI, cl. 2 provides as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The "immigration clause" of the United States Constitution, U.S. Const. art. I, § 8, cl. 4 provides in pertinent part: "The Congress shall have Power ... To establish a uniform Rule of Naturalization...."

The relevant portions of the New Mexico Workmen's Compensation Act N.M. Stat. Ann. §§ 52-1-8, 52-1-9, and 52-1-52 are set forth in Appendix E, infra.

The relevant portions of the New Mexico wrongful death statute N.M. Stat. Ann. §§ 41-2-1 and 41-2-3 are set forth in Appendix F, infra.

STATEMENT OF THE CASE

At issue in this case is the New Mexico Supreme Court's construction of the exclusive remedy provision of the state's Workmen's Compensation Act. The New Mexico high court has deprived Mrs. Talamantes, as representative of her husband's estate, of any claim for the negligent death of Bernardo Talamantes. Through the Act's alien exclusion clause, barring death benefits to non-resident aliens, and the state courts construction of the Act's "exclusive remedy" clause, barring

all other common law remedies, Mrs. Talamantes and her children have been stripped of the right to any remedy or compensation whatsoever for the negligent death of their husband and father.

On November 25, 1977 Bernardo Talamantes, a Mexican national residing in New Mexico, was killed while working for the Kent Nowlin Construction Company in New Mexico. Mrs. Talamantes and her children are and were then Mexican citizens residing in the state of Chihauhua. Mrs. Talamantes as personal representative of the estate of her husband brought a wrongful death action under N.M. Stat. Ann. §§ 41-2-1 - 41-2-3 (1978) against Kent Nowlin Construction Company in the District Court for Bernalillo County, New Mexico. After trial, a jury found that the construction company was liable for the negligent electrocution of Mr. Talamantes and awarded $175,000 in damages for his wrongful death.

On September 30, 1982, the New Mexico Court of Appeals upheld the judgment. On certiorari a sharply divided State Supreme Court filed an opinion reversing the trial court and held over a vigorous dissent that summary judgment should have been granted in favor of defendants. This opinion became the final judgment of the Court on January 14, 1983.[1]

In this final judgment the State Supreme Court construed the exclusive remedy provisions of New Mexico's Workmen's Compensation Act (N.M. Stat. Ann. §§ 51-1-8(c) - 51-1-9 (1978))

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[1]Within one day of issuing its original opinion on May 6, 1982, the State Supreme Court withdrew the opinion sua sponte. On September 30, 1982, the Court subsequently reissued its opinion, with a vigorous dissent attached. The Court then granted plaintiff's request for rehearing. (See Appendix A.) After accepting briefs on the merits which fully argued the federal constitutional questions, the Court issued an order, on January 14, 1983, quashing its grant of rehearing and reinstating the original decision of September 30, 1982. (See Appendix B.) The ruling of January 14, from which this appeal follows, was a denial of the application for rehearing, an entry of the New Mexico Supreme Court's final judgment, and a rejection of appellants' constitutional claims.

to prohibit Mr. Talamantes' "dependents residing outside the United States at the time of the worker's injury ... from pursuing..." a wrongful death action. 22 N.M. Bar Bull. 351, at 353 (1983).

This construction of the exclusive remedy provision when considered in tandem with Section 52-1-52 of the Act absolutely bars the Talamantes family from any claim for the wrongful death of Bernardo Talamantes. Section 52-1-52 denies recovery otherwise available under the Act to a worker's alien relatives or dependents if they are residing outside the United States at the time of the worker's injury. The decision in this case followed hard upon an earlier State Supreme Court ruling upholding Section 52-1-52 against constitutional challenge in Pedrazza v. Sid Fleming Contractor, Inc., 94 N.M. 59, 607 P.2d 597 (1980).[2]

By the joint operation of the majority opinion's interpretation of the exclusive remedy provision and the alien exclusion clause of § 52-1-52, Mrs. Talamantes is caught up in a classic "Catch 22."[3] Under the decision of the State

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[2]Pedrazza likewise was a Mexican national. As in this case, his surviving dependents resided in Mexico at the time of his death. 94 N.M. at 61, 607 P.2d at 599. In Pedrazza the State Supreme Court, while cutting off workmen's compensation relief to non-resident aliens, nevertheless indicated that other remedies and compensation were available:

> This opinion does not deny plaintiffs other avenues of recovery. The worker and his dependents are independent of and take separately from one another under the Act. Therefore, the bar against using other legal remedies to recover for the injury or death of a worker cannot be raised against those dependents not covered by the Act.

Pedrazza v. Sid Fleming Contractor, Inc., supra at 63, 607 P.2d at 601. In one sentence, the Court in Gutierrez v. Kent Nowlin Construction Co., 22 N.M. S. Bar Bull. 351 (1983), simply dismissed the above statement as dicta and thus disregarded it. Id. at 353.

[3]After the death of her husband, Mrs. Talamantes originally filed a claim under the New Mexico Workmen's Compensation Act. While that claim was pending, she participated as amicus curiae in the State Supreme Court's decision in Pedrazza. When that decision made clear her exclusion from workmen's compensation benefits, but directed

Supreme Court in this case, and despite the fact that the Kent Nowlin Construction Company negligently caused her husband's death, Mrs. Talamantes cannot bring a wrongful death action because her exclusive remedy lies in the Workmen's Compensation Act. Regrettably, however, she has no remedy under the Workmen's Compensation Act, because she and her children are non-resident alien dependents and thus precluded from recovery under § 52-1-52, as upheld in Pedrazza.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The opinion of the New Mexico Supreme Court construes the "exclusive remedy" provision of the Workmen's Compensation Act to bar appellants from pursuing their wrongful death action. The necessary effect of this opinion, read together with the Pedrazza opinion, is to deprive non-resident alien dependents of any remedy or compensation whatsoever for the employment related deaths of their husbands, fathers and providers. This construction of the "exclusive remedy" provision and the compensation act will have a wide- spread and undesirable effect on alien workers and violates the United States Constitution in three distinct ways.

First, it deprives foreign nationals of due process by absolutely and arbitrarily denying any claim, remedy or compensation for a work-related negligent death. Second, the challenged construction contravenes the equal protection clause of the fourteenth amendment because it plainly disadvantages a class without furthering a sufficient state interest. While resident dependents are compensated for the work-related death of their breadwinner, and while alien non-resident dependents of those negligently killed while not on the job can pursue a cause of action, non-resident alien survivors are denied any benefits for work-related deaths.

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her to other avenues of recovery, Mrs. Talamantes filed the wrongful death action which has led to this appeal.

Third, the opinion's construction violates the supremacy clause, U.S. Const. art. VI, cl. 2 because it interprets New Mexico law in a manner which is inconsistent with the solemn treaty obligations between the United States and Mexico, and because it trenches upon the exclusive and plenary powers of Congress to regulate immigration and foreign affairs. U.S. Const. art. I, § 8, cl. 4.

POINT I

IF THE OPINION OF THE STATE SUPREME COURT IN THIS CASE IS ALLOWED TO STAND IT WILL HAVE WIDESPREAD AND PERNICIOUS CONSEQUENCES.

The consequences of the New Mexico Supreme Court's reading of the exclusive remedy provision in this case are widespread. Workers and their non-resident alien dependents will be left without recourse, while employers such as the Kent Nowlin Construction Company will be freed from any obligation to compensate for negligent conduct and indeed will have no deterrence to their negligence.

There are large numbers of workers from Mexico and other countries in New Mexico. Many of them work in construction and other fields where injury and death are not uncommon. Most of them have dependents residing outside the United States.[4] Moreover, four other states have alien-exclusion provisions substantially similar to New Mexico's in their Workmen's Compensation Acts.[5] In another four states, non-resident aliens receive only a percentage of the full death

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[4]Stelzner, Precis of Wayne Cornelius's "Mexican Migration to the United States -- Causes, Consequences, and United States Responses," in The Problems of the Undocumented Worker 15 (GPO 1981).

[5]Ala. Code § 25-5-52, -53 (Cum. Supp. 1981) (complete bar against non-resident aliens); Fla. Stat. Ann. § 440.16(7) (Cum. Supp. 1981) ($1,000 ceiling on benefits to non-resident aliens); Ga. Code Ann. § 114-413(e) (Cum. Supp. 1982) ($1,000 ceiling); and Kan. Stat. Ann. § 44-510(b)(i) (Supp. 1980) ($750 ceiling).

benefits otherwise accruing to residents.[6] If the decision of the State Supreme Court below stands, it will send a clear message to each of those states that non-resident alien dependents can be totally deprived of relief or compensation for the death of their breadwinners.

POINT II

AS CONSTRUED BY THE SUPREME COURT OF NEW MEXICO, THE EXCLUSIVE REMEDY PROVISION VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

This case does not fit neatly within the ambit of any of this court's due process clause cases. Nevertheless, it shares the essential characteristics of two related lines of cases, and results in a deprivation more absolute and egregious than found in either.

In the first line of cases this Court has found that a statutory cause of action is a species of property, the deprivation of which receives the full protection of the due process clause of the fourteenth amendment. Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982); see also Martinez v. California, 444 U.S. 277 (1980). In the second line of cases this Court had held that a denial of due process arises from certain limitations upon a party's access to the courts. Boddie v. Connecticut, 401 U.S. 371 (1971); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

In Logan this Court recently held that a procedural limitation on a claimants ability to assert his statutorily created employment discrimination claim deprived him of a

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[6] Ariz Rev. Stat. Ann. § 23-1046(c) (1982) (60%); Del. Code Ann. tit. 19, § 2333 (Rev. Pam. 1974) (50%); Ill. Rev. Stat. ch. 48, § 138.7(1) (Cum. Supp. 1982) (50%); Utah Code Ann. § 35-1-72 (Repl. Pamp. 1974) (50%). This Court recently failed to note probable jurisdiction in Jalifi v. Arizona Industrial Commission, 51 U.S.L.W. 3286 (1982) (Justice White would have noted probable jurisdiction). Jalifi upheld Arizona's 60% recovery provision over due process and equal protection challenges. Az. Ct. Appl, Div 1, 3/11/82. Mrs. Talamantes' appeal involves much more substantial questions, because of the total deprivation involved here and because of the supremacy clause violations not presented in Jalifi.

property interest in that cause of action without due process. Logan v. Zimmerman Brush Co., 455 U.S. 422, 437 (1982). The Court in Logan concluded that while a legislature may choose not to create or recognize a particular cause of action once it has created a cause of action, it may not constitutionally deprive anyone of their property interest in that claim without appropriate procedural safeguards. See Logan, 455 U.S. at 432; Vitek v. Jones, 445 U.S. 480, 490-91, n.6 (1980); Arnett v. Kennedy, 416 U.S. 134, 167 (1974). This Court found that Logan was entitled to a hearing on the merits of his claim before it could be dismissed. Logan at 434.

In Boddie this Court employed the slightly different but analogous theory that at least where interests of basic importance are involved and the State has exclusive control over the adjustments of claims through the judicial process, "absent a countervailing state interest of overriding significance" persons must be given "a meaningful opportunity to be heard," Logan, 422 U.S. at 430, n.5, quoting Boddie, 401 U.S. at 377, 379.

As this Court recognized in Logan, these two lines of analysis are closely related. 422 U.S. at 430, n.5. Under Boddie, access to the courts must be "meaningful" and not a mere charade. At the same time Logan requires that "having made access to the courts an entitlement or a necessity, the State may not deprive someone of that access unless the balance of state and private interests favors the government scheme." Logan, 422 U.S. at 430, n.5.

These two theories of due process converge in this case, which involves a denial of access as well as a deprivation of a cause of action. An alien dependent like Mrs. Talamantes may recover under New Mexico's wrongful death statute. Trujillo v. Prince, 42 N.M. 337, 78 P.2d 145, 150 (1938); Torres v. Sierra, 89 N.M. 441, 553 P.2d 721 (Ct. App.), cert. denied, 90 N.M. 8, 588 P.2d 620 (1976). Thus, she has a property

interest in her statutorily created cause of action for the wrongful death of her husband. She has been absolutely deprived of that property interest without any hearing whatsoever on the merits of her claim.

Furthermore, the statutory construction challenged here violates the clear mandate of Boddie v. Connecticut which involved another type of exclusive remedy -- the state's exclusive control over divorce proceedings. Just as petitioners in Boddie were subject to a state monopoly on marriage dissolution, Mr. Talamantes was subject to a compulsory and exclusive employment injury scheme. Boddie dictates that after imposing such a scheme the state may not then deny meaningful access to the courts; any such denial violates due process. While in the narrowest sense the personal representatives of Mr. Talamantes may have access to the courts, they surely do not have the "meaningful access" mandated in Boddie. As interpreted by the majority opinion below, the exclusive remedy provision of the New Mexico compensation act is a charade. It provides no remedy whatsoever.

In this case, then, the State of New Mexico makes access to the courts an entitlement and a necessity. Despite this, the majority opinion's construction of the exclusive remedy provision of the Workmen's Compensation Act totally deprives Mrs. Talamantes of effective access to the courts in order to press her claim. However, the balance of state and private interests do not favor this construction. Indeed, it is wholly arbitrary and irrational.

Under the state court's construction of its Workmen's Compensation Act, whether an alien dependent may be compensated in New Mexico for the death of a worker seems almost a matter of serendipity. If her husband had not been on the job when he was negligently killed, Mrs. Talamantes could recover under New Mexico's Wrongful Death Act (N.M. Stat. Ann. §§ 41-2-1 to 41-2-3 (1978)) even if she were a non-resident alien

dependent. See, e.g., Torres v. Sierra, 89 N.M. 441, 553 P.2d 721 (Ct. App.), cert. denied, 90 N.M. 8, 558 P.2d 620 (1976). Furthermore, if Mrs. Talamantes and her children were resident aliens they could, of course, recover death benefits under the Workmen's Compensation Act. N.M. Stat. Ann. §§ 52-1-1 to 52-1-69 (1978). Thus, following the New Mexico Supreme Court's rationale, it is only because of the confluence of two factors in this case -- non-resident alienage of the dependents, and the employment-related death -- that Mrs. Talamantes is completely deprived of any cause of action.

The only rationale articulated by the court below was that its construction of the exclusive remedy provision reflects a "balance between the worker's need for expeditious payment and the employer's need to limit liability." 22 N.M. S. Bar Bull. at 352. However that balance is thoroughly upset when, as in this case, the worker and his dependents receive no relief at all from their exclusive remedy, while the employer incurs no liability whatsoever.

Nor can it even be seriously suggested that there are substantial administrative difficulties involved in determining the appropriate compensation for non-resident aliens. Since 1938 non-resident alien dependents have been recognized as proper recipients of benefits under New Mexico's Wrongful Death Act. Trujillo v. Prince, 42 N.M. 337, 345, 78 P.2d 145, 150 (1938); Torres v. Sierra, 89 N.M. 441, 553 P.2d 721 (Ct. App.), cert. denied, 90 N.M. 8, 558 P.2d 620 (1976). Presumably, administrative difficulties have been overcome or been proven fanciful.[7]

Most important, it is certain that depriving Mrs. Talamantes of any relief at all, and providing the Kent Nowlin

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[7]Moreover, Mexican counsul officers can facilitate matters through their power to represent non-resident Mexican nationals and to receive benefits on their behalf. See n.13, infra.

Construction Company with a windfall despite its negligence, subverts the purposes of both New Mexico's Wrongful Death Act and its Workmen's Compensation scheme. These provisions were drawn to insure humanitarian and economic compensation for their beneficiaries, as well as to deter negligent conduct. See e.g., Anaya v. N.M. Steel Erectors Inc., 94 N.M. 370, 610 P.2d 1190 (1980); Trujillo v. Prince, 42 N.M. 337, 78 P.2d 145, 150 (1938).[8] Both of these purposes are utterly undermined by the necessary impact of the majority opinion's construction of the "exclusive remedy" provision.

In sum, no legitimate state interest is served by the majority opinion's construction of the "exclusive remedy" clause of the compensation act. On the contrary, plaintiffs and other alien dependents are totally deprived of remedy or compensation while employers are relieved of the consequences of their negligence.

POINT III

THE STATE SUPREME COURT'S CONSTRUCTION OF THE EXCLUSIVE REMEDY PROVISION OF THE WORKMEN'S COMPENSATION ACT VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

It is well established that a state statutory scheme which discriminates invidiously on the basis of alienage violates the equal protection clause of the fourteenth amendment. See e.g. Plyler v. Doe, ___ U.S. ___, 102 S. Ct. 2382 (1982); Graham v. Richardson, 403 U.S. 365 (1971). Quite apart from

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[8]This Court has observed that where the state is merely defining the elements of a statutorily-created cause of action its "interest in fashioning its own rules of tort law is paramount to any federal interest except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational." Martinez v. California, 444 U.S. 277, 282 (1980). In this case, the majority opinion did not merely define an element of a workmen's compensation claim. Rather, coupled with Pedrazza, it created an absolute bar to recovery by a particular class -- non-resident alien dependents.

In any event, as discussed infra, the state court's interpretation of the "exclusive remedy" provision is "wholly arbitrary and irrational."

alienage, a statutory classification which serves no rational state purpose violates the equal protection clause.

A. Mr. Talamantes' Equal Protection Interests Are Implicated By This Construction of the Exclusive Remedy Provision.

Appellants' interests under New Mexico's wrongful death statute derive from the interests of the decedent. New Mexico's wrongful death statute is a "survival-type" statute. See, e.g. Stang v. Hertz, 81 N.M. 348, 467 P.2d 14 (1970); Natseway v. Jojola, 56 N.M. 793, 800, 251 P.2d 274, 278 (1952). This type of statute preserves the decedent's own cause of action rather than creating an independent cause of action in the survivors for their injuries. See W. Prosser, The Law of Torts § 902 (4th ed. 1971). Therefore, the Court's construction of the "exclusive remedy" provision of the compensation act implicates not only independent interests of the non-resident alien dependents, but also implicates interests of the resident alien worker, Mr. Talamantes, who can claim the benefits of the equal protection clause.

In addition, whatever the nature of New Mexico's wrongful death statute, under this Court's decisions Mr. Talamantes has been deprived of rights as a result of the New Mexico court's construction. In Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) the plaintiffs challenged a section of the Social Security Act which provided benefits for widowed mothers, but not for fathers whose wives had died. Despite the fact that the claimed benefits would have been paid to the husband, this Court concluded that the wife's rights were implicated because the section operated "to deprive women of protection for their families...." 420 U.S. at 645. Likewise, the invidious discrimination in the present case operates to deprive Mr. Talamantes of protection for his family, and thus implicates his rights under the equal protection clause.

B. Because It Creates a Classification Based on Alienage, The Court's Construction Violates the Equal Protection Clause.

The effect of the court's opinion in this case is to create two legal regimes to deal with compensation of workers who die in work-related accidents. For one set of workers and their dependents the law provides a remedy and compensation. For the others, like Mr. Talamantes, there is neither remedy nor compensation. The distinction between the two groups is based solely on alienage.[9]

Classifications based on alienage are subject to the strictest scrutiny, Graham v. Richardson, 403 U.S. 365, 372 (1971); Toll v. Moreno, ___ U.S. ___, 102 S. Ct. 2977 (Blackmun J., concurring at 2987); or at a minimum require some special solicitude requiring justification by "some substantial goal of the state." Plyler v. Doe, 102 S. Ct. 2382 (1982). See also United States v. Carolene Products, 304 U.S. 144, 152-53 n.4 (1945).

There are no "substantial goals" of the State of New Mexico which can justify the discrimination wrought by the court's construction of the workers' compensation act, which deprives non-resident aliens of any remedy or compensation whatsoever for the negligent death of their husband, father, and breadwinner. Certainly an interest in preserving the financial resources of the employer is constitutionally unavailing. In Plyler, this Court expressly rejected Texas' proffered justification that protecting even the public fisc warranted the discrimination. 102 S. Ct. at 2400. See also Toll v. Moreno, ___ U.S. ___, 102 S. Ct. 2977 (1982), (Blackmun J., concurring). Moreover, any justification based on a state's interest in discouraging illegal immigration was also rejected in Plyler, 102 S. Ct. at 2398-2400, and would be

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[9]While section 52-1-52 appears neutral on its face, the New Mexico Supreme Court in Pedrazza candidly identified the bar to survivors' benefits as "hostile" legislation, 92 N.M. at 62, 607 P.2d at 600. See also Gallup America Coal Co. v. Lira, 39 N.M. 496, 501, 50 P.2d 430, 435 (1935).

similarly inappropriate in this case.[10] Plyler compels the conclusion that the workmen's compensation act, as construed below, violates the equal protection clause.

C. The Classification Created by the Court Below Is Arbitrary and Irrational and Fails Even Under the "Rational Basis" Test.

A classification which serves no rational state purpose must fail. Royster Guano v. Virginia, 253 U.S. 412 (1920) As discussed above in Points II & III (B), supra, there is no seriously articulable rational for the classification scheme created by the challenged construction of the exclusive remedy provision. Indeed no legitimate goal of the state is imaginable which could justify the harshness, hostility and discrimination against aliens evinced by depriving appellants of all remedy and compensation for the negligent death of Mr. Talamantes. Therefore, at any level of scrutiny, the court's construction of the compensation act violates the equal protection clause of the fourteenth amendment.

POINT IV

THE STATE SUPREME COURT'S CONSTRUCTION OF THE EXCLUSIVE REMEDY PROVISION VIOLATES THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION.

A. The Court's Construction Is In Conflict with Controlling Federal Treaties.

In Kolovrat v. Oregon, 366 U.S. 187 (1961), the Court struck down under the supremacy clause a state statute prohibiting non-resident aliens from inheriting property. This Court concluded that the statute conflicted with federal obligations: "[S]tate policies as to the rights of aliens to inherit must give way under our Constitution's Supremacy

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[10] If anything, this construction of the "exclusive remedy" provision would tend to promote illegal immigration. Alien dependents who physically reside in New Mexico, even illegally, are "residents" of the state. See Perez v. HSSD, 91 N.M. 334, 573 P.2d 689 (Ct. App.), cert. denied, 91 N.M. 491, 576 P.2d 297 (1978). To protect themselves and their families prudent workers are likely to move their families to the United States with or without documents.

Clause to 'overriding' federal treaties and conflicting arrangements ...." 366 U.S. at 190. In reaching its holding, the Court rejected a narrow and technical construction by the state court of a treaty between the United States and Yugoslavia, stating that the treaty must be construed liberally to give effect to the purpose of the treaty to ensure free traffic and commerce among the signatory nations. 366 U.S. at 192-93, 194.

The New Mexico Court's construction of the "exclusive remedy" provision of the workers' compensation statute as barring any compensation and remedy whatsoever to nonresident alien survivors of the worker contravenes solemn treaty obligations between the United States and Mexico. The 1831 Treaty of Amity, Commerce, and Navigation Between the United States of America and the United Mexican States,[11] 8 Stat. 410, was incorporated by reference into the Treaty of Guadalupe Hidalgo, 9 Stat. 922, art. XVII (1848). Article XIV of the 1831 Treaty clearly establishes that Mexican nationals are to have "special protection to [their] persons and property" in the United States. The same article goes on to provide that this "special protection" shall be executed by providing to Mexican nationals "open and free" access to the courts, on equal terms as are afforded to citizens of the United States. The article finally provides:[12]

> [T]he citizens of either party, or their agents, shall enjoy, in every respect, the same rights and privileges, either in prosecuting or defending their

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[11] This treaty must be construed liberally to give effect to its stated purpose to establish "most favored nation status" to the signatories, art. III, and to promote free and secure commerce and intercourse between the citizens of the two countries. Art. IV.

[12] It should be noted that while all the other clauses of article XIV of the treaty limit the rights conferred therein to Mexicans within the territorial confines of the United States, this last clause has no such limitation and applies, by its terms, to all Mexican citizens, whether resident or non-resident in the United States.

rights of person or of property, as the citizens of the country where the cause may be tried.

The court's construction of the "exclusive remedy" provision and the workers' compensation act conflicts with the explicit and implicit requirements of the 1831 treaty in several ways. First, in construing the statute to completely insulate a negligent employer who causes the death of a Mexican national working in the United States, it can hardly be said that "special protection to the person" of the Mexican national is being afforded. Moreover, in denying to the survivors of the decedent any right to compensation whatsoever, either through survivors' benefits or wrongful death action, the court construes the compensation act in such a way as to specifically deny to Mexican nationals the same "rights and privileges, either in prosecuting or defending their rights of person or of property,"[13] as United States citizens are afforded. The "exclusive remedy" provision of the workers' compensation statute, as construed by the majority opinion, is in conflict with controlling federal treaties and therefore is violative of the supremacy clause.

B. The Court's Construction Interferes with the Federal Government's Exclusive and Plenary Control Over Immigration Policy.

Even if the court's construction of the "exclusive remedy" provision did not conflict with specific treaty

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[13]Moreover, article IX, section 2, of the Convention between the United States and Mexico respecting the duties of consular officers specifically identifies as one of the duties of the consul to collect and receive "on behalf of his non-resident countrymen ... [benefits] accruing under provisions of so-called Workmen's Compensation Laws or other like statutes." 57 Stat. 800. An analysis of the entire range of treaties and arrangements between the United States and Mexico establishes that it is the intention of the signatory countries that non-resident Mexican nationals would not be deprived of all remedies or compensation for the death of a Mexican worker in the United States, as the New Mexico Court holds. Rather, these solemn treaty obligations clearly contemplate that non-resident Mexican survivors would be entitled to compensation and would have the ability to pursue their right to compensation through judicial remedy.

obligations, it would still violate the supremacy clause because the statute, as construed, interferes with the federal government's exclusive and plenary control over immigration policy. The Constitution of the United States of America vests exclusive and plenary authority in the federal government to regulate immigration into the United States. U.S. Const. art. I, § 8, cl. 4; see Toll v. Moreno, ___ U.S. ___, 102 S. Ct. 2977 (1982). The United States Supreme Court and lower federal courts have held consistently that where a state statutory scheme imposes discriminatory burdens upon the entrance or residence of aliens, such a scheme encroaches on the federal government's power to regulate immigration and therefore is preempted under the supremacy clause. See e.g., Toll v. Moreno, at 2982; Graham v. Richardson, 403 U.S. 365 (1971).

In Toll v. Moreno, this Court held that a University of Maryland policy which precluded non-immigrant aliens from consideration as in-state students for tuition purposes imposed a discriminatory burden on the aliens in violation of the supremacy clause. Similarly, in Graham v. Richardson this Court struck down an Arizona regulatory scheme which imposed discriminatory treatment on aliens by requiring a five-year residency period for alien eligibility for welfare benefits, where no such durational eligibility requirement existed for United States citizens. The Court held that this discriminatory treatment trenched on Congress' exclusive power to regulate immigration and therefore violated the supremacy clause. "State laws that restrict the eligibility of aliens for welfare benefits merely because of their alienage conflict with these overriding national policies in an area constitutionally entrusted to the Federal Government." 403 U.S. at 378.

The court's construction of the "exclusive remedy" provision of the compensation act creates just the type of state-imposed discriminatory burden invalidated in Toll and Graham. Like the regulatory schemes in those cases, the construction

of the "exclusive remedy" provision is discriminatory. While resident survivors are afforded some benefits and remedies for the death of the decedent, non-resident aliens are denied all benefits and remedies. Like Toll and Graham, the discriminatory treatment is based on alienage.[14] Finally, like the schemes in those cases, the deprivation of any compensation or remedy to alien workers and their survivors imposes a burden on the immigration of alien workers to New Mexico. The total and discriminatory deprivation of all compensation and remedy to non-resident alien survivors is violative of the supremacy clause.

CONCLUSION

Because of the substantiality of the constitutional questions presented, appellants respectfully request that the Court note probable jurisdiction and set this case for plenary consideration, including briefs on the merits and oral argument in support thereof.

Respectfully submitted,

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[14] See n.9, supra.

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO
Friday, October 15, 1982

NO. 13,914

KENT NOWLIN CONSTRUCTION COMPANY,

Petitioner,

vs. Original Proceeding on Certiorari

ESTELA E. GUTIERREZ and MARIA SOTA VDA DE TALAMANTES,

Respondents.

This matter coming on for consideration by the Court upon Motion of Respondents for a rehearing, and the Court having considered said motion and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that Motion of Respondents for rehearing is hereby granted.

IT IS FURTHER ORDERED that Respondents shall file a brief addressing the issues contained in the motion for rehearing on or before ten (10) days from the date hereof and Petitioner shall have ten days from the date of filing of Respondents' brief to file their responsive brief.

ATTEST: A True Copy

ROSE MARIE ALDERETE
CLERK OF THE SUPREME COURT

By _____ Deputy

OCT 22 1982

APPENDIX B

AMENDED ORDER

NO. 13,914

KENT NOWLIN CONSTRUCTION COMPANY,

Petitioner,

vs. Original Proceeding on Certiorari

ESTELA E. GUTIERREZ and MARIA SOTA VDA DE TALAMANTES, as co-personal representatives of the Estate of Bernardo Talamantes a/k/a Hector M. Baylon, Deceased,

Respondents.

WHEREAS, it appearing to the Court that an Order was entered by this Court on October 13, 1982, granting Motion for Rehearing in the above cause, and it now appearing to the Court, upon reconsideration of the motion for rehearing, that the Order entered by the Court on October 13, 1982 should be vacated and set aside, Mr. Justice Federici, Mr. Justice Riordan and Mr. Justice Stowers concurring, Mr. Senior Justice Sosa dissenting, Mr. Chief Justice Payne dissenting without opinion;

NOW, THREFORE, IT IS ORDERED that the Order entered by the Court on October 13, 1982, granting the motion for rehearing is hereby vacated and set aside.

IT IS FURTHER ORDERED that the Opinion of the Court of Appeals in Cause No. 4931, together with the dissent, be published in the New Mexico Reports.

SUPREME COURT OF NEW MEXICO
FILED
JAN 14 1983

ATTEST: A TRUE COPY

Rose Marie Aldrete

Clerk of the Supreme Court
of the State of New Mexico

Rose Marie Aldrete

JAN 20 1983

APPENDIX C

Bulletin

ADVANCE OPINIONS OF
THE SUPREME COURT &
THE COURT OF APPEALS

From the New Mexico Supreme Court

KENT NOWLIN CONSTRUCTION COMPANY
Petitioner,

versus

ESTELA E. GUTIERREZ and MARIA SOTA VDA DE TALAMANTES,
as co-personal representatives of the Estate of Bernardo Talamantes,
a/k/a Hector M. Baylon, Deceased,
Respondents.

No. 13914 (filed September 30, 1982)

ORIGINAL PROCEEDING ON CERTIORARI

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Attorney for Respondents

OPINION

MACK EASLEY, Chief Justice

Estela Gutierrez and Maria Sota Vda De Talamantes, as co-personal representatives of the Estate of Bernardo Talamantes (Talamantes), brought a wrongful death action against Kent Nowlin Construction Company. The matter was heard before a jury, which returned a verdict in favor of the Talamantes' Estate for $175,000. The Court of Appeals affirmed the trial court, and we reverse the Court of Appeals.

The dispositive issue raised on certiorari is: Whether the New Mexico Workmen's Compensation Act, Sections 52-1-1 through 52-1-69, N.M.S.A. 1978 (Orig. Pamp. & Cum. Supp. 1981), is an exclusive remedy, thereby precluding a wrongful death action brought by relatives or dependents not residents of the United States at the time of the deceased's injury.

Talamantes died in the course of and in the scope of his employment with Nowlin. Nowlin's workmen's compensation carrier paid all medical bills and funeral expenses but would not pay benefits to his dependents or relatives because they were residents of the Republic of Mexico at the time of Talamantes' death.

Nowlin argues that the Workmen's Compensation Act is an exclusive remedy and therefore recovery is limited to the Act. Sections 52-1-8 and 52-1-9,

N.M.S.A. 1978. Since the Act specifically denies recovery for the worker's dependents or relatives residing outside of the United States at the time of injury, Section 52-1-52, N.M.S.A. 1978, the personal representatives of the estate are entitled to nothing. The wrongful death action was therefore improper, and the motion for summary judgment in the guise of a motion for failure to state a claim should have been granted.

Gutierrez, on the other hand, relies on our opinion Pedrazza v. Sid Fleming Con., Inc., 94 N.M. 59, 607 P.2d 597 (1980). The decedent in Pedrazza was a Mexican national employed in New Mexico, and he was killed in the course of his employment. His surviving dependents were all non-resident aliens and challenged Section 52-1-52 as unconstitutional. That provision reads:

> Compensation shall be exempt from claim of creditors and from any attachment, garnishment or execution, and shall be paid only to such workman or his personal representative, or such other persons as the court may, under the terms hereof, appoint to receive or collect the same. No claim or judgment for compensation, under this act, shall accrue to or be recovered by relatives or dependents not residents of the United States at the time of the injury of such workman. [Emphasis added.]

We upheld the constitutionality of this provision and the bar to benefits under the Act. We went on to say:

> This opinion does not deny plaintiffs other avenues of recovery. The worker and his dependents are independent of and take separately from another under the Act. Therefore, the bar against using other legal remedies to recover for the injury or death of a worker cannot be raised against those dependents not covered by the Act.

Pedrazza v. Sid Fleming Contractor, Inc., supra at 63, 607 P.2d at 601. The Court of Appeals relied on our language and affirmed the decision of the trial court.

We begin by analyzing the intent and purpose behind the Act. Before the advent of workmen's compensation acts, employees had little hope in recovering monetary judgments under common law torts. W. Prosser, Law of Torts Section 80 (4th ed. 1971). Approximately seventy to ninety-four percent of all labor casualties received no compensation under the common law. 1 E. Blair, Reference Guide to Workmen's Compensation Law 1-1 (1968). To ameliorate this hardship, our Legislature passed the Workmen's Compensation Act. Gonzales v. Chino Copper Co., 29 N.M. 228, 222 P.2d 903 (1924). The exclusive remedy provisions are a balance between the worker's need for expeditious payment and the employer's need to limit liability. See Roseberry v. Phillips Petroleum Company, 70 N.M. 19, 369 P.2d 403 (1962); Prosser, supra.

With this background, we are asked to interpret whether Section 52-1-52, which denies recovery under the Act to worker's relatives or dependants living outside the United States, falls within the exclusive remedy provisions of the Act. The pertinent parts of the exclusive remedy provisions state:

> Any employer who has complied with the provisions of the Workmen's Compensation Act . . . shall not be subject to any other liability whatsoever for the death of or personal injury to any employee, except as provided in the Workmen's Compensation Act, and all causes of action, actions at law, suits in equity and proceedings whatever, and all statutory and common-law rights and remedies for and on account of such death of, or personal injury to, any such employee and accruing to any and all persons whomsoever, are hereby abolished except as provided in the Workmen's Compensation Act. [Emphasis added.]

Section 51-1-8(C), N.M.S.A. 1978.

> The right to the compensation provided for in this act [is] in lieu of any other liability whatsoever to any and all persons whomsoever, for . . . death resulting therefrom. . . . [Emphasis added.]

Section 52-1-9, N.M.S.A. 1978.

"When the words of the statute are

clear and unambiguous, we are bound by their plain meaning." Federal Land Bank of Wichita v. Burgett, ___ N.M. ___, 641 P.2d 1066 (1982). The plain meaning of these provisions is that the Act is an exclusive remedy, unless otherwise provided for in the Act. The Act does not make an exception, and we will not create one. Our language in Pedrazza was dicta. Dictum is unnecessary to the holding of a case and therefore is not binding as a rule of law. Rocky Mountain Life Insurance Company v. Reidy, 69 N.M. 36, 363 P.2d 1031 (1961). We hold that resident dependents residing outside the United States at the time of the worker's injury are barred from pursuing their common law remedies due to the exclusive remedy provisions under the Act. To hold otherwise would subject employers to unlimited liability and defeat the underlying principles of the Act.

Since we have held that the motion for summary judgment should have been granted, we do not reach the other issues raised on certiorari.

IT IS SO ORDERED.

s/MACK EASLEY, Chief Justice

WE CONCUR:
s/WILLIAM R. FEDERICI, Justice
s/WILLIAM RIORDAN, Justice

DAN SOSA, Senior Justice dissents.
H. VERN PAYNE, Justice, respectfully dissents without opinion.

DISSENTING OPINION

I cannot concur with the majority opinion. The fundamental flaw with the majority's position is that they have applied the Workmen's Compensation Act to a party who has been expressly excluded by the Legislature from its operation.

This case was submitted to a jury on the issue of wrongful death. The jury was instructed that an illegal alien in the United States is entitled to sue in our courts, under our laws, the same as a citizen. (f.n. 1) The jury returned a verdict for the plaintiffs-respondents in the amount of $175,000.00. In order to have returned this verdict, the jury necessarily

concluded that Kent Nowlin Construction Company (f.n. 2) negligently took the life of Mr. Talamantes. (f.n. 3)

Yet, in an attempt to insulate themselves from liability, the employer herein argues that since the deceased was a worker, any cause of action for his death must be filed under the Workmen's Compensation Act, and his dependents, as nonresident aliens, are not entitled to damages. The majority was persuaded by this specious contention; I am not.

The dispositive issue on appeal is not as phrased by the majority, but rather is whether a nonresident alien dependent is covered by the Workmen's Compensation Act so that the exclusivity provision of the Act, Section 52-1-9, N.M.S.A. 1978, would preclude his estate from bringing a wrongful death action. The answer is clearly in the negative.

The majority, however, disagrees. In deciding that nonresident aliens have no remedy whatsoever when a member of their family is killed through the negligence of a United States citizen employer, the majority dismisses our rationale in Pedrazza v. Sid Fleming Con., Inc., 94 N.M. 59, 607 P.2d 597 (1980), as mere dicta. (f.n. 4) In particular, the majority classifies the following language as unnecessary to the holding in Pedrazza.

> This opinion does not deny plaintiffs other avenues of recovery. The worker and his dependents are independent of and take separately from one another under the Act. Therefore, the bar against using other legal remedies to recover for the injury or death of a worker cannot be raised against those dependents not covered by the Act.

Id. at 63, 607 P.2d at 601.

I disagree that this language is dicta. Had this Court concluded in Pedrazza that the dependents' claims to compensation were derivative of the worker, a different conclusion may have been reached. In addition, had this Court concluded that the Workmen's Compensation Act was the exclusive remedy and that a nonresident alien has no cause of action in the United States for the death of a family member during the course of his employment, then a

different conclusion may have been reached. However, the above-quoted paragraph was essential to this Court's holding that the denial of recovery under the Act did not violate the equal protection clause of our constitutions.

In addition, the above-quoted statement is legally correct under prevailing statutory construction principles. Statutory construction principles must be applied by a court with the ultimate purpose of ascertaining and giving effect to the manifest intent of the Legislature in enacting the statute under scrutiny. See Section 12-2-2, N.M.S.A. 1978. We must give a statute its literal reading if the words used are plain and unambiguous, provided such a construction would not lead to an injustice, absurdity or contradiction. State v. Nance, 77 N.M. 39, 419 P.2d 242 (1966), cert. denied, 386 U.S. 1039 (1967).

The exclusivity provision of the Workmen's Compensation Act provides:

> The right to the compensation provided for in this act [52-1-1 to 52-1-69 NMSA 1978], [is] in lieu of any other liability whatsoever, to any and all persons whomsoever, for any personal injury . . . or death . . . . [Emphasis added.]

Section 52-1-9.

As this Court held in Mountain States Tel. & Tel. Co. v. Montoya, 91 N.M. 788, 581 P.2d 1283 (1978), the above-quoted provision means that:

> Once a workmen's compensation act has become applicable either through compulsion or election, it affords the exclusive remedy for the injury by the employee or his dependents against the employer and insurance carrier. This is part of the quid pro quo in which the sacrifices and gains of employees and employers are to some extent put in balance, for, while the employer assumes a new liability without fault, he is relieved of the prospect of large damage verdicts. [Emphasis added.]

Id. at 791, 581 P.2d at 1286 (quoting 2A A. Larson, Workmen's Compensation Law Section 65.10 (1976)). We are bound by this particular ruling in Mountain States, supra. Gallos Chevrolet Co. v. Chaney, 92 N.M. 618, 593 P.2d 59 (1979).

Thus, the preliminary issue we must address is whether the respondents in this case have a right to compensation under the Workmen's Compensation Act. The answer is clearly no. Section 52-1-52 provides in pertinent part:

> No claim or judgment for compensation, under this act [52-1-1 to 52-1-69 NMSA 1978], shall accrue to or be recovered by relatives or dependants not residents of the United States at the time of the injury of such workman. [Emphasis added.]

It is undisputed that the respondents in this case are nonresident alien dependents. The clear and unambiguous meaning of the above-quoted provision is that a nonresident alien dependent has no right to compensation under the Workmen's Compensation Act. The exclusivity provision of the Act provides that only those who are entitled to compensation under the Act take in lieu of any other liability. Since the respondents in this case are not entitled to compensation under the Act, they do not take in lieu of any other liability provisions (e.g., a wrongful death action). Nowhere in the Act has the Legislature specifically denied nonresident aliens other statutory or common law remedies when a citizen employer negligently takes the life of their family member.

Section 52-1-8, N.M.S.A. 1978, does not assist the majority in reaching their conclusion. In Pedrazza, supra, we held that a dependent's recovery under the Act was separate and distinct from the recovery afforded an employee. Therefore, the status of the dependents would determine whether they could recover under the Act. The respondents here are nonresident aliens, and, as such, they may not recover under the Act. Section 52-1-52.

Section 52-1-8 provides that all statutory and common law rights are abolished when an employer is in compliance with the Act, unless otherwise provided. Since Section 52-1-52 denies nonresident alien dependents the right to compensation under the Act, they are excluded from the operation of Sections 52-1-8 and 52-1-9 as well.

A nonresident alien dependant simply does not enjoy the benefits of the Act. As we acknowledged in Mountain States, supra, under this Act, an employee is given the benefit of a no fault action in return for the limited liability given the employer. As the majority acknowledges, the Workmen's Compensation Act was enacted as a humanitarian statute to ameliorate the hardship faced by employees when seventy to ninety-four percent of all labor casualties were not compensated. See Gonzales v. Chino Copper Co., 29 N.M. 228, 222 P. 903 (1924); 1 E. Blair, Reference Guide To Workmen's Compensation Law 1-1 (1968). Under the legislative scheme, if you are a resident dependent, then you need not prove fault to recover damages for the death of your family member caused during the course of his employment. However, if you are a nonresident, you must prove fault, even though the odds of doing so are weighted heavily against you.

In this case, the nonresident aliens did prove negligence, and they did so in the face of contributory negligence. Insulating an employer from having to pay damages to a nonresident family for negligently taking the life of their "breadwinner" on the basis of a strained statutory analysis is unjust, absurd and contrary to legislative intent. The Legislature did not indicate in the Act that its intention was to deny nonresident aliens any other statutory or common law remedies when an employee may be injured or die while on the job because of the negligence of an employer.

This Court held in Pedrazza, supra, that the plaintiffs in that case did not have a due process right to workmen's compensation benefits. This Court also held that the plaintiffs in Pedrazza were beyond the reach of the equal protection clause. However, under the supremacy clause of the United States Constitution, a federal treaty will control over a state statute that frustrates federal policy. U.S. CONST. art. VI, sec. 2. The United States has treaties with thirteen countries (not including Mexico) under which nonresident alien workers and their dependents are guaranteed the same rights and privileges as American nationals. 2A. Larson, Workmen's Compensation Law Section 63.52 (1981). Although the United States does not have a treaty with Mexico specifically granting such rights to nonresidents, the United States has entered into treaties with Mexico which assume that Mexicans will be given such rights. For example, Article IX, Section 2 of a Convention between the United States of America and Mexico respecting the duties and rights of consular officers authorizes Mexican consuls to accept payments accruing to their countrymen under Workmen's Compensation Laws or like statutes. Convention on Consular Officers, proclaimed June 16, 1943, United States-Mexico, art. IX, sec. 2, 57 Stat. 800.

In any event, the position taken by the majority that, insofar as a nonresident alien is prevented from seeking damages for the death of a family member under any theory, they are covered by the Workmen's Compensation Act, is inconsistent and illogical. I agree that nonresident alien dependents cannot claim compensation under the Act; however, they can pursue other avenues for recovery. The only reason the Legislature provided that nonresident alien dependents could not recover under the Act is because, had they not so specified, the nonresident alien could have recovered under the Act without proving fault on the part of the employer.

The New Mexico Wrongful Death Act, Sections 41-2-1 to 41-2-4, N.M.S.A. 1978 (Repl. Pamp. 1982), was designed to provide a remedy where death is caused by the wrongful action of another and where the wrongdoer would have been liable to the injured party if death had not occurred. See Whitmer v. El Paso & S.W. Co., 201 F. 193 (5th Cir. 1912). The record clearly establishes, and the jury found, that Mr. Talamantes was killed through the negligence of Kent Nowlin Construction Co. Indeed, Kent Nowlin Construction Co. has not even argued to this Court that there is not substantial evidence to warrant support of the jury's decision. Under such facts as these, a wrongful death action would be the appropriate legal remedy for the

personal representatives of the decedent to pursue for the negligent death of their breadwinner. If Mr. Talamantes had lived, he would have had the right to sue for personal injuries. Because he died, that right belongs to his personal representatives. A Mexican national serving as a personal representative may maintain a claim for wrongful death. Torres v. Sierra, 89 N.M. 441, 553 P.2d 721 (Ct. App.), cert. denied, 90 N.M. 8, 558 P.2d 620 (1976). This was done here by Mr. Talamantes' dependants. Clearly, such nonresident alien personal representatives should be allowed to avail themselves of the laws of New Mexico to seek compensation for wrongful death.

The majority opinion serves notice to all the world that people who do not reside in the United States have no cause of action when an employer in the United States negligently takes the life of their family member. The majority apparently believes that the sign in the courtroom in which we hear oral arguments monthly should read: "Dedicated to the administration of equal justice under law, except for nonresident Mexican aliens."

I cannot join in this unjust construction of the Workmen's Compensation Act. I respectfully dissent.

s/DAN SOSA JR., Senior Justice

FOOTNOTES

1. This jury instruction was not challenged and, as such, is binding on the parties. N.M.R. Civ. P. 51(J), N.M.S.A. 1978 (Cum. Supp. 1981).
2. Kent Nowlin, as a corporation, is subject to liability under the Wrongful Death Act. See Section 41-2-1, N.M.S.A. 1978.
3. This case was tried under the doctrine of contributory negligence.
4. Justice Payne authored the opinion in Pedrazza, in which Justices Easley and Felter concurred and Justice Federici dissented. I did not participate.

APPENDIX D

IN THE SUPREME COURT

OF THE STATE OF NEW MEXICO

ESTELA E. GUTIERREZ and
MARIA SOTA VDA DE TALAMANTES
as co-personal representatives
of the Estate of BERNARDO
TALAMANTES a/k/a HECTOR M.
BAYLON, deceased,

Plaintiffs,

vs.

KENT NOWLIN CONSTRUCTION
COMPANY,

Defendant.

filed
4-8-83

No. CV-78-3123

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that ESTELA E. GUTIERREZ and MARIA SOTA VDA DE TALAMANTES, plaintiffs in the above-captioned cause, hereby appeal to the Supreme Court of the United States from the denail of rehearing and the resulting final entry of judgment issued by this Court on January 14, 1983.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Respectfully submitted,

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Attorneys for Plaintiffs

I hereby certify that on
the 8th day of April, 1983,
a copy of the foregoing
was mailed to opposing
counsel Zachary L. McCormick,
PO Box 2168, Albuquerque,
New Mexico 87103.

APPENDIX E

New Mexico Workmens' Compensation Act

52-1-8. Defenses to action by employee.

In an action to recover damages for a personal injury sustained by an employee while engaged in the line of his duty as such, or for death resulting from personal injuries so sustained in which recovery is sought upon the ground of want of ordinary care of the employer, or of the officer, agent or servant of the employer, it shall not be a defense:

A. that the employee, either expressly or impliedly, assumed the risk of the hazard complained of as due to the employer's negligence;

B. that the injury or death was caused, in whole or in part, by the want of ordinary care of a fellow servant; and

C. that the injury or death was caused, in whole or in part, by the want of ordinary care of the injured employee where such want of care was not willful.

Any employer who has complied with the provisions of the Workmen's Compensation Act [52-1-1 to 52-1-69 NMSA 1978] relating to insurance, or any of the employees of the employer, including management and supervisory employees, shall not be subject to any other liability whatsoever for the death of or personal injury to any employee, except as provided in the Workmen's Compensation Act, and all causes of action, actions at law, suits in equity and proceedings whatever, and all statutory and common-law rights and remedies for and on account of such death of, or personal injury to, any such employee and accruing to any and all persons whomsoever, are hereby abolished except as provided in the Workmen's Compensation Act.

52-1-9. Right to compensation; exclusive.

The right to the compensation provided for in this act [52-1-1 to 52-1-69 NMSA 1978], in lieu of any other liability whatsoever, to any and all persons whomsoever, for any personal injury accidentally sustained or death resulting therefrom, shall obtain in all cases where the following conditions occur:

A. at the time of the accident, the employer has complied with the provisions thereof regarding insurance;

B. at the time of the accident, the employee is performing service arising out of and in the course of his employment; and

C. the injury or death is proximately caused by accident arising out of and in the course of his employment and is not intentionally self-inflicted.

52-1-52. [Exemption of compensation from claims of creditors, attachment, garnishment or execution; payees; residents of foreign countries barred from receiving payment.]

Compensation shall be exempt from claim of creditors and from any attachment, garnishment or execution, and shall be paid only to such workman or his personal representative, or such other persons as the court may, under the terms hereof, appoint to receive or collect the same. No claim or judgment for compensation, under this act [52-1-1 to 52-1-69 NMSA 1978], shall accrue to or be recovered by relatives or dependents not residents of the United States at the time of the injury of such workman.

APPENDIX F

New Mexico Wrongful Death Statutes

41-2-1. [Death by wrongful act or neglect; liability in damages.]

Whenever the death of a person shall be caused by the wrongful act, neglect or default of another, although such death shall have been caused under such circumstances as amount in law to a felony, and the act, or neglect, or default, is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured.

41-2-3. [Personal representative to bring action; damages; distribution of proceeds of judgment.]

Every such action as mentioned in Section 41-2-1 NMSA 1978 shall be brought by and in the name or names of the personal representative or representatives of such deceased person, and the jury in every such action may give such damages, compensatory and exemplary, as they shall deem fair and just, taking into consideration the pecuniary injury or injuries resulting from such death to the surviving party or parties entitled to the judgment, or any interest therein, recovered in such action, and also having regard to the mitigating or aggravating circumstances attending such wrongful act, neglect or default. The proceeds of any judgment obtained in any such action shall not be liable for any debt of the deceased: provided, he or she shall have left a husband, wife, child, father, mother, brother, sister or child or children of the deceased child, but shall be distributed as follows:

First. If there be a surviving husband or wife, and no child, then to such husband or wife; if there be a surviving husband or wife and a child or children or grandchildren, then equally to each, the grandchild or grandchildren taking by right of representation; if there be no husband or wife, but a child or children, or grandchild or grandchildren, then to such child or children and grandchild or grandchildren by right of representation; if such deceased be a minor, childless and unmarried, then to the father and mother, who shall have an equal interest in the judgment, or if either of them be dead, then to the survivor; if there be no father, mother, husband, wife, child or grandchild, then to a surviving brother or sister, or brothers or sisters, if there be any; if there be none of the kindred hereinbefore named, then the proceeds of such judgment shall be disposed of in the manner authorized by law for the disposition of the personal property of deceased persons.

7

SEP 30 1981

82-6614

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

ESTELA E. GUTIERREZ and MARIA SOTA VDA DE TALAMANTES as co-personal representatives of the Estate of BERNARDO TALAMANTES a/k/a HECTOR M. BAYLON, deceased,

Plaintiffs-Appellees,

v. No. 4931

KENT NOWLIN CONSTRUCTION COMPANY,

Defendant-Appellant

COURT OF APPEALS OF NEW MEXICO
FILED
SEP 30 1981

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY

LOVE, Judge

TIMOTHY M. SHEEHAN
Sheehan & Sheehan

and

WILLIAM H. CARPENTER
Albuquerque, New Mexico

Attorneys for Appellees

ZACHARY L. McCORMICK
Modrall, Sperling, Roehl, Harris & Sisk, P.A.
Albuquerque, New Mexico

Attorney for Appellant

O P I N I O N

HERNANDEZ, Chief Judge

This is a wrongful death action. The defendant appeals from a judgment, entered on a jury verdict, in favor of plaintiffs.

The deceased, Bernardo Talamantes, was killed while in the course and scope of his employment with defendant. Defendant's insurance carrier paid all medical bills, and $1,500.00 in funeral expenses. The deceased left surviving him a widow and six minor children, all of whom were residents of the Republic of Mexico on the date of the accidental injury and death.

The defendant alleges six points of error which will be considered in sequence.

POINT I: The New Mexico Workmen's Compensation Act [Sections 52-1-1 to 52-1-69, N.M.S.A. 1978] provided the exclusive remedy against the defendant.

The pertinent sections and subsections of the Act read as follows:

Section 52-1-6 (D):

> Such compliance with the provisions of the Workmen's Compensation Act, including the provisions for insurance, shall be, and construed to be, a surrender by the employer and the employee of their rights to any other method, form or amount of compensation or determination thereof, or to any cause of action at law, suit in equity or statutory or common-law right to remedy or proceeding whatever for or on account of such personal injuries or death of such employee than as provided in the Workmen's Compensation Act, and shall be an acceptance of all of the provisions of the Workmen's Compensation Act, and shall bind the employee himself, and for compensation for his death, shall bind his personal representatives, his surviving spouse and next of kin, as well as the employer, and those conducting his business during bankruptcy or insolvency.

Section 52-1-8:

> Any employer who has complied with the provisions of the Workmen's Compensation Act [52-1-1 to 52-1-69 NMSA 1978] relating to insurance . . . shall not be subject to any other liability whatsoever for the death of or personal injury to any employee, except as provided in the Workmen's Compensation Act, and all causes of action, actions at law, suits in equity and proceedings whatever,

and all statutory and common-law rights and remedies for and on account of such death of, or personal injury to, any such employee and accruing to any and all persons whomsoever, are hereby abolished except as provided in the Workmen's Compensation Act.

Section 52-1-9:

The right to the compensation provided for in this act, in lieu of any other liability whatsoever, to any and all persons whomsoever, for any personal injury accidentally sustained or death resulting therefrom, shall obtain in all cases where the following conditions occur:

A. at the time of the accident, the employer has complied with the provisions thereof regarding insurance;

B. at the time of the accident, the employee is performing service arising out of and in the course of his employment; and

C. the injury or death is proximately caused by accident arising out of and in the course of his employment and is not intentionally self-inflicted.

Section 52-1-17:

As used in the Workmen's Compensation Act unless the context otherwise requires, the following persons, and they only, shall be deemed dependents and entitled to compensation under the provisions of the Workmen's Compensation Act:

A. a child under eighteen years of age. . . ;

B. the widow . . . ; . . . only if . . . legally entitled to be supported by him. . . .

Section 52-1-52:

Compensation shall be exempt from claim of creditors and from any attachment, garnishment or execution, and shall be paid only to such workman or his personal representative, or such other persons as the court may, under the terms hereof, appoint to receive or collect the same. No claim or judgment for compensation, under this act shall accrue to or be recovered by relatives or dependents not residents of the United States at the time of the injury of such workman. (Emphasis added.)

Section 41-2-3, N.M.S.A. 1978 of the New Mexico Wrongful Death Act provides:

Every such action as mentioned in Section 41-2-1 NMSA 1978 shall be brought by and in the name or names of the personal representative or

> representatives of such deceased person, and the jury in every such action may give such damages, compensatory and exemplary, as they shall deem fair and just, taking into consideration the pecuniary injury or injuries resulting from such death to the surviving party or parties entitled to the judgment, or any interest therein, recovered in such action, and also having regard to the mitigating or aggravating circumstances attending such wrongful act, neglect or default. The proceeds of any judgment obtained in any such action shall not be liable for any debt of the deceased . . . but shall be distributed as follows: . . . if there be a surviving husband or wife and a child or children or grandchildren, then equally to each, the grandchild or grandchildren taking by right of representation; . . . if there be none of the kindred hereinbefore named, then the proceeds of such judgment shall be disposed of in the manner authorized by law for the disposition of the personal property of deceased persons.

The defendant contends that the Workmen's Compensation Act provides the exclusive remedy against the employer in a case of this nature. Defendant, in support of this contention, cites us to Gallegos v. Chastain, ____N.M._____, ____P.2d____ (Ct. App. 1981) wherein we held that:

> The exclusivity provisions have consistently been applied. "Our statutes could scarcely be more explicit in abolishing every statutory or common law right or remedy against the employer not provided by the Workmen's Compensation Act, accruing to any person whomsoever, which arises by reason of such injury."

The plaintiffs, for their part, cite us to Pedrazza v. Sid Fleming Contractor, Inc., 94 N.M. 59, 607 P.2d 597 (1980). The basic facts in that case are the same as in this case: The workman was killed while working. The natural mother of his children filed a complaint, in their behalf, for benefits under our Workmen's Compensation Act. The children were residents of the Republic of Mexico. The employer moved for dismissal claiming that the children were precluded from recovery by reason of § 52-1-52. The trial court granted the motion and our Supreme Court affirmed, despite a challenge to § 52-1-52 on due process and equal protection grounds. In so ruling, our Supreme Court had this to say:

> It is important to note the exclusive nature and operation of workmen's compensation. If an employer and employee are covered by the Act, all their rights and remedies are defined exclusively by the Act. § 52-1-9, N.M.S.A. 1978. As between the employer and the employee, all other common law and statutory actions are barred by the Act. This bar also applies to the employee's dependents to the extent that they are covered by the Act.

Pedrazza, supra at 61, 607 P.2d at 599 [Emphasis added.]

> This opinion does not deny plaintiffs other avenues of recovery. The worker and his dependents are independent of and take separately from one another under the Act. Therefore, the bar against using other legal remedies to recover for the injury or death of a worker cannot be raised against those dependents not covered by the Act.

Id. at 63, 607 P.2d at 601 [Emphasis added.]

We, of course, are governed by the precedents of our Supreme Court. Alexander v. Delgado, 84 N.M. 717, 507 P.2d 778 (1973). The defendant contends that the above quoted language is mere dictum and need not be followed in this case. We do not, however, consider the language to be in the category of mere dictum. Rather, it seems to us that the notion that the opinion would not necessarily foreclose other forms of recovery by non-resident alien dependents was the key to the Supreme Court's decision upholding the bar to recovery of Workmen's Compensation. Under these circumstances, we give serious consideration to the language of the Supreme Court in Pedrazza. While perhaps not essential to the decision, it is nonetheless an expression of the views of a majority of our Supreme Court who deemed the matter of sufficient importance to merit discussion. We choose to follow the lead of our Supreme Court and hold that our Workmen's Compensation Act does not bar this wrongful death action.

Some additional comments regarding the nature of a claim under our Wrongful Death Act, Sections 41-2-1, et seq., N.M.S.A. 1978, and rules governing statutory construction are necessary. The wrongful death statute serves two important functions - deterrence and compensation.

> [O]ur Death by Wrongful Act Statute has to some degree an objective of public punishment and was designed in part at least to act as a deterrent to the negligent conduct of others and thereby promote the public safety and welfare.

Trujillo v. Prince, 42 N.M. 337, 78 P.2d 145 (1938).

> [A]n action for wrongful death . . . belongs to the beneficiaries and is designed to compensate for the loss of the relational interest existing between the beneficiaries and the deceased. . . . [T]he action for wrongful death has for its purpose the compensation of the survivors for the loss of benefits caused by the death of the deceased, and does not belong to the estate of the deceased or become an asset thereof.

Wurtzinger v. Jacobs, 148 N.W. 2d 86 (Wis. 1967). See also Varney v. Taylor, 77 N.M. 28, 419 P.2d 234 (1966).

New Mexico's Wrongful Death Act was enacted in 1882 and our Workmen's Compensation Act in 1929.

> In interpreting a statute this court may presume that the legislature was informed as to existing law, and that the legislature did not intend to enact a law inconsistent with any existing law . . . .

City Commission of Albuquerque v. State, 75 N.M. 438, 405 P.2d 924 (1965).

When two statutes cover the same subject matter, and they are capable of co-existing, then it is our duty to give effect to both. City Commission of Albuquerque v. State, supra. We believe both our opinion allowing common law recovery herein and the Supreme Court's opinion in Pedrazza do exactly this.

POINT II: The court's instruction allowing the jury to award damages without proof of monetary loss incorrectly stated New Mexico law.

The instruction referred to reads as follows:

> If you find for the Plaintiff on the issue of liability, you must decide the amount of damages which would compensate for the monetary worth of the life of decedent had it continued.
>
> In fixing damages, you should consider: (1) The monetary loss, or lack of it, to the family, but damages may be recovered without proof of such monetary loss; (2) The age, earning capacity, health, habits

> and probable duration of life of the decedent; (3) The monetary value of the personal services of the decedent to the family; (4) The aggravating or mitigating circumstances attending the conduct which results in death.
>
> The weight to be given to the evidence upon such issues is for you to determine. It is your responsibility to award such damages as may be fair and just to both sides under all the circumstances of this case.
>
> In fixing damages, deductions must be made from gross earnings or earning capacity, if any, for income taxes, social security taxes, other taxes and personal living expenses of the decedent.
>
> Damages for future loss of money will be paid in lump sum; and a reasonable discount should be made for the future earning power of such lump sum.
>
> You may not consider:
>
> (1) The loss of decedent's society to the family;
>
> (2) The grief or sorrow of the family; or
>
> (3) The property or wealth of the survivors or the Defendant.
>
> Your verdict must be based on evidence, not upon speculation, guess, or conjecture. You must not permit the amount of damage to be influenced by sympathy or prejudice.

Defendant correctly points out that at the time of trial there was no uniform jury instruction on damages in a wrongful death case. The instruction given by the trial court was a modification of a draft of proposed U.J.I. 18.30, which was subsequently adopted in large part by the Supreme Court. The controversy in this appeal concerns the part that was not so adopted. It is found in the last clause of the first subparagraph (1) of the court's instruction and reads: "but damages may be recovered without proof of such monetary loss." It should also be noted that the trial court deleted from U.J.I. 18.30 the bracketed elements of damages not relevant to this case, thus only instructing the jury on the element of the monetary worth of the life of the decedent.

The defendant contends that the allowance of damages without proof of monetary loss is contrary to New Mexico law. Further, it contends that the offending portion of the instruction was confusing and misleading to the jury. As support for its contentions, the defendant points to the fact that the language was deleted when U.J.I. 18.30 was adopted.

The fact that the jury instruction adopted by the Supreme Court differs from that given by the trial court does not ipso facto make the latter incorrect. The questions to be answered are: (1) was the questioned section a correct statement of the law; and (2) was it, when read in conjunction with the other parts of the instruction, inconsistent and therefore possibly misleading or confusing? The answer to both questions is NO. The case of Stang v. Hertz Corporation, 81 N.M. 348, 467 P.2d 14 (1970) gives the answer to the first question. There, the Court said:

> . . . [Section] 22-20-3, supra [Section 41-2-3, NMSA 1978], clearly permits recovery by other than a statutory beneficiary, and recovery may be had even though there is no pecuniary injury to a statutory beneficiary. Damages are recoverable by proof of the worth of the life of the decedent, even though there is no kin to receive the award.
>
> . . . .
>
> The statutes allowing damages for wrongful act or neglect causing death have for their purpose more than compensation. It is intended by them, also, to promote safety of life and limb by making negligence that causes death costly to the wrongdoer.
>
> . . . .
>
> . . . [T]he more reasonable construction of our statute [is] to the effect that substantial damages are recoverable without proof of pecuniary loss.

Thus, the subparagraph complained of was not an incorrect statement of the law.

As to the second question it is our opinion that the language is plain and unambiguous and conveys a clear and definite meaning. Moreover, jury instructions are to be read as a whole and if when

so read, they fairly reflect the issues and law applicable thereto there is no reversible error. Roybal v. Lewis, 79 N.M. 227, 441 P.2d 756 (1968). When so read, the court's damage instruction was proper in all respects. The first paragraph informed the jury that the measure of damages was the monetary worth of the life of the decedent. The next paragraph told the jury four factors to consider in fixing such monetary worth. There followed several paragraphs of caveats cautioning the jury to be fair and not to speculate. Most importantly of all, the instruction explicitly told the jury not to consider such intangibles as loss of society or grief. The instruction, when considered as a whole, effectively put a "brake" on what elements of damages the jury could consider. Hence, no error occurred.

POINT III: The F.E.L.A. [Federal Employees Liability Act] does not apply to this action, and the court erred in giving the jury instructions designed for F.E.L.A. cases.

The three instructions complained of read as follows:

INSTRUCTION NO. 11

> It was the continuing duty of the defendant, as an employer, at the time and place in question, to use ordinary care under the circumstances there existing, to furnish the plaintiff with a reasonably safe place in which to work, and to use ordinary care under the circumstances, to maintain and keep the place of work in a reasonably safe condition. This does not mean, of course, that the employer is a guarantor or insurer of the safety of the place to work. The extent of the employer's duty is to exercise ordinary care, under the circumstances, to see that the place in which the work is to be performed is reasonably safe.

INSTRUCTION NO. 12

> It was the duty of the Defendant Kent Nowlin Construction Company to use ordinary care to provide its employees with safe tools and machinery and appliances with which to do their work and keep them in a safe condition. In exercising ordinary care, the corporation need not necessarily provide the latest or best tools, machinery and appliances which could have been provided to do the work.

INSTRUCTION NO. 13

> It was the duty of the Defendant Kent Nowlin Construction Company to exercise ordinary care to provide the Plaintiff with a sufficient number of employees to safely perform the work being done.

Defendant argues that these instructions interjected false issues and were repetitious. Defendant argues that these instructions interjected false issues into the law suit because they are very similar to U.J.I. Civ. 9.12, 9.13 and 9.14 which are to apply only in cases where common carriers by railroad are involved.

> It is well established in this jurisdiction that each party is entitled to an instruction on his theory of the case if he has pled it and there is evidence upon which the theory might be supported.

Mac Tyres, Inc. v. Vigil, 92 N.M. 446, 589 P.2d 1037 (1979). The plaintiff pled negligence, failure to provide a safe place to work, failure to provide safe equipment and failure to provide sufficient employees to safely perform the work. Defendant does not argue that there was no evidence to support the giving of these instructions.

The instructions given were a correct statement of the law and applicable under the facts of this case. Under New Mexico law the master has the duty to furnish the servants in his employ a reasonably safe place in which to work. Padilla v. Winsor, 67 N.M. 267, 354 P.2d 740 (1960). Generally, it is the master's duty to provide his servants reasonably safe and suitable tools and equipment sufficient to do the work contemplated. Brandt v. Richter, 159 N.W. 2d 471 (Iowa 1968).

> It is not open to question that an employer owes a duty to his employee to supply him with tools and appliances that are reasonably safe for the work he assigns him.

Norton v. Lumbra, 238 A. 2d 628 (Vt. 1968).

> It is also the duty of the employer to furnish a sufficient number of men to do the work with reasonable safety to all those engaged in its accomplishment.

Todd v. Watson, 501 S.W. 2d 48 (Mo. 1973).

Nor is the fact that the instructions modeled after the proposed U.J.I. for F.E.L.A. cases error. This Court has recently held that where there are no U.J.I. instructions on an issue, the trial court may use analogous U.J.I instructions as a modeling point. McCrary v. Bill McCarty Construction Co., 92 N.M. 552, 591 P.2d 683 (Ct. App. 1979). It is our opinion that these instructions did not interject a false issue and they were not repetitious.

POINT IV: The liability of the Employer may not be predicated on violations of O.S.H.A. (Occupational Safety & Health Act of 1970, 29 U.S.C.A., §651 et seq.) regulations and the court's instructions allowing the jury to consider those regulations was erroneous.

The instruction complained of told the jury that there were certain federal safety standards in existence at the time of the occurrence which provided that cranes working near electrical lines shall have certain minimum clearance and further provided that an employee be designated to observe such clearances. The instruction concluded by informing the jury that a violation of the standards was evidence the jury could consider with all the other evidence in deciding whether the defendant was negligent.

The defendant complains that the instruction was erroneous because O.S.H.A. itself states that violations of regulations promulgated under it may not be used to create civil liability, 19 U.S.C. § 653 (b)(4). Defendant concedes that the regulations may be used for guidance but asserts that their violation may not in and of itself prove negligence. In making these contentions, the defendant overlooks the basis of the trial court's instruction and mischaracterizes the instruction's directives.

The federal safety standards referred to in the instruction were not only promulgated pursuant to O.S.H.A., but they were also promulgated under the Contract Work Hours and Safety Act. The

work in which defendant was engaged at the time of the accident was contract work. In the contract the defendant explicitly contracted to conform its operation to the standards required by the Contract Work Hours and Safety Act.

> It is well established that a duty of care can arise from a contractual relationship, and a cause of action in tort may sometimes be allowed where there is a failure to perform a contractual duty, or where such duty is negligently performed.

Duff v. Harrah South Shore Corporation, 125 Cal. Rptr. 259 (1975).

> A party may be liable in negligence for the breach of a duty which arises out of a contractual relationship.

Sasso v. Ayotte, 235 A.2d 636 (Conn. 1967). See also Tipton v. Glover, 67 N.M. 388, 356 P.2d 46 (1960).

Moreover, the instruction did not, by any stretch of the imagination, tell the jury that violation of the standards was in and of itself negligence. The instruction merely informed the jury that violation of the standards was a fact that jurors could consider. This is consistent with the defendant's concession that the regulations may be used for guidance and accordingly, defendant's fourth point is without merit.

POINT V: The fellow servant rule barred the plaintiff's claim against the defendant and the trial court erred in refusing to allow the employer to amend its answers and in refusing to instruct the jury with respect to the rule.

The fellow servant rule was adopted in New Mexico in 1892 in the case of Lutz v. Alt. & Pac. R'y Co., 6 N.M. 496, 30 P. 912 (1892):

> . . . [I]t is now the unquestioned law that damages cannot be recovered for injuries sustained by reason of the negligence of fellow servants. Negligence of such servants of a common employer is part of the risk which public policy requires that an employee take in entering upon a service in which there are fellow servants.

From the language of this quotation, it is readily seen that the

fellow servant doctrine is nothing more than a species of assumption of the risk. See also Alternman v. Jinks, 179 S.E. 2d 92 (Ga. App. 1970).

Assumption of risk as an affirmative defense in New Mexico was abolished by our Supreme Court in Williamson v. Smith, 83 N.M. 336, 491 P.2d 1147 (1971). The language used by the Supreme Court in so doing leaves no doubt but that it intended the fellow servant doctrine to be buried in the same grave as the defense of assumption of the risk:

> Assumption risk evolved in master and servant cases. As the United States Supreme Court has observed, it developed in response to the general impulse of the common law courts "to insulate the employer as much as possible from bearing the 'human overhead' which is an inevitable part of the cost--to someone--of the doing of industrialized business. The general purpose behind this development in the common law seems to have been to give maximum freedom to expanding industry."
>
> . . . .
>
> The doctrine, being a manifestation of laissez faire economics, was a subject of criticism even during its early years. [Citations omitted.] As Justice Frankfurter later noted in the Tiller case, supra:
>
> > ". . . The notion of assumption of risk as a defense--that is, where the employer concedely failed in his duty of care and nevertheless escaped liability because the employee had 'agreed' to 'assume the risk' of the employer's fault--rested, in the context of our industrial society, upon a pure fiction."
>
> . . . .
>
> The reasonableness of insulating business from human overhead, however valid it may have been during the moment of the industrial revolution, now runs directly counter to current social policy, as typified by the underlying theory of modern workmen's compensation legislation, both general and specifically in regard to the safety of work areas.
>
> . . . .
>
> Finally, in the employer-employee frame of reference, the concept of assumption of risk is one hundred eighty degrees out of phase with our

> legal policy of requiring the employer to provide his employees with a reasonably safe place to work.
>
> . . . .
>
> For these reasons, assumption of risk will no longer be a defense in New Mexico. . . .

In conformity with Williamson we hold that the fellow servant rule is no longer a defense in New Mexico. The trial court did not err in refusing to allow defendant to amend its answer and in refusing to instruct the jury with respect to the rule.

POINT VI: There was no evidence to support the assumption that the decedent's earning capacity was equal to that of a United States citizen employed in construction work and the verdict is therefore not supported by the evidence.

Dr. Everett G. Dillman, an economist and statistician and plaintiff's expert witness, testified first as to his qualifications and then gave a detailed explanation of how he arrived at his opinion of the present value of decedent's earning capacity ($141,000). Defendant's counsel interposed only one objection to this testimony and that objection was sustained. Defendant's counsel did not move that all or any part of Dr. Dillman's testimony be excluded nor did he request that limitations be placed on the purpose for which the testimony could be considered. Defendant's counsel conducted a thorough and searching cross-examination of the basis for Dr. Dillman's opinion and his qualifications and possible bias. Several of the questions asked by defendant's counsel dealt with the fact that decedent was a Mexican national and in this country illegally. These questions did not alter Dr. Dillman's opinion.

It is our opinion that plaintiff's evidence was more than sufficient to create a jury issue. The weight to be given to this evidence was for the jury to decide. We would remind counsel that an expert witness' opinions cannot be questioned for the first

time on appeal when those opinions were admitted at trial without objection or motion to exclude. See Hancock v. Beasley, 14 N.M. 239, 91 P. 735 (1907); Winder v. Martinez, 88 N.M. 622, 545 P.2d 88 (Ct. App. 1975). We would also point out that:

> An illegal alien in the United States is entitled to the same rights to damages that a citizen has under the tort laws of the state and federal government. Low Moor Iron Co., supra. Trotta's Adm'r v. Johnson, Briggs & Pitts, 121 Ky. 827, 90 S.W. 540 (1906) says:
>
> > We treat him [an illegal alien] as a human being, who, if wronged while within our jurisdiction in any personal or property right, may be redressed in our courts according to the laws of this state, giving such measure of compensation as we deem a proper equivalent for the wrong done. [90 S.W. at 541].

Torres v. Sierra, 89 N.M. 441, 553 P.2d 721 (Ct. App. 1976).

The defendant also complains of the excessiveness of the verdict in that it was some $30,000 higher than Dr. Dillman's figures. This complaint is manifestly without merit. Dr. Dillman only testified as to one element on damages in a wrongful death case, i.e. earning capacity. See U.J.I. 18.30. As we noted in Baca v. Baca, 81 N.M. 734, 472 P.2d 997 (Ct. App. 1970), absence of proof of pecuniary injury does not preclude an award of damages.

Finding no error the judgment below is affirmed.

IT IS SO ORDERED.

B. C. Hernandez
CHIEF JUDGE

WE CONCUR:

Lewis R. Sutin J.

J.

JUN 16 1983

No. 82-6614

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

Supreme Court, U.S.
FILED
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Alexander L. Stevas, Clerk

ASTRID GALINDO SARDOZ and MARIA SOTO VDA. DE TALAMANTES as co-personal representatives of the Estate of BERNARDO TALAMANTES, a/k/a HECTOR M. BAYLON, deceased,

Appellants,

vs.

KENT NOWLIN CONSTRUCTION COMPANY,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW MEXICO

MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

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SUPREME COURT OF THE UNITED STATES

October Term, 1982

ASTRID GALINDO SARDOZ and MARIA SOTO VDA, DE TALAMANTES as co-personal representatives of the Estate of BERNARDO TALAMANTES, a/k/a HECTOR M. BAYLON, deceased,

Appellants,

vs.

KENT NOWLIN CONSTRUCTION COMPANY,

Appellee.

MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

Come now appellants and move this Court for leave to proceed with an appeal to this Court in forma pauperis. As grounds therefore Appellants allege:

1. Appellant Astrid Galindo Sardoz is the newly appointed Consul for the Mexican Government, who in her official capacity has been substituted for her predecessor in office Estela E. Gutierrez pursuant to Rule 40.3 of the Rules of this Court.

2. The Mexican Consul regularly serves as personal representative for non-resident Mexican citizens who wish to invoke the jurisdiction of American courts, and appellant Astrid Galindo Sardoz, as well as her predecessor in office, Estela E. Gutierrez have done so in this cause on behalf of appellant Maria Soto Vda. De Talamantes, who is a non-resident alien and a citizen of Mexico.

3. Appellant Astrid Galindo Sardoz has no personal interest in the present litigation. Her interest, by virtue of her official capacity is to facilitate the perfecting of this appeal on behalf of Maria Soto Vda. De Talamantes, widow of the deceased Bernardo Talamantes.

4. Appellant Astrid Galindo Sardoz has executed the attached affidavit setting forth with particularity facts showing that Mrs. Talamantes falls within the statutory requirements for in forma pauperis status.

5. Leave to proceed in forma pauperis was not sought in any court below.

6. Counsel in this appeal are serving without fee, pro bono publico.

7. Appellants are filing contemporaneously herewith their Jurisdictional Statement.

WHEREFORE, Appellants request that leave be granted for them to proceed with this appeal in forma pauperis.

Respectfully submitted,

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No. 82-6614

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

ASTRID GALINDO SARDOZ and MARIA SOTO VDA DE TALAMANTES as co-personal representatives of the Estate of BERNARDO TALAMANTES, a/k/a HECTOR M. BAYLON, deceased,

Appellants,

vs.

KENT NOWLIN CONSTRUCTION COMPANY,

Appellee.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

STATE OF NEW MEXICO)
) ss
COUNTY OF BERNALILLO)

I, ASTRID GALINDO SARDOZ, being duly sworn, depose and state:

1. I am the Mexican Consul, with offices situated in Albuquerque, New Mexico.

2. As a regular part of my duties on behalf of the Government of Mexico I regularly serve as personal representative for non-resident Mexican citizens who wish to invoke the jurisdiction of American courts, and that I am serving in that capacity on behalf of Maria Soto Vda De Talamantes, who is the real party in interest in this action.

3. Maria Soto Vda De Talamantes is a citizen of Mexico,

and she resides in the small village of Via Coronado in the State of Chihuahua, Mexico.

4. Mrs. Talamantes is thirty-six years old; she is the widow of Bernardo Talamantes who was killed in an industrial accident in the United States. That accident and Mrs. Talamantes' claim against the American employer are the subject matter of this action.

5. Mr. and Mrs. Talamantes had six children.

6. At the time of the accident which gave rise to this action, Mrs. Talamantes and her six children relied exclusively for support and maintenance upon the wage earning and labor of her husband Bernardo Talamantes.

7. Since her husband's death, Mrs. Talamantes and her children have been able to maintain themselves only through the minimal income received from her menial labor and the good graces and charity of their friends and neighbors in Via Coronado.

8. As a result of the foregoing Mrs. Talamantes is unable to pay the costs or give security for the payment of the costs of this appeal.

9. This action involves a federal constitutional challenge to the New Mexico Workman's Compensation Act, N.M. Stat. Ann. § 52-1-1 et seq. (1978), as interpreted by the New Mexico Supreme Court in the action below.

10. This appeal is taken in good faith under a belief that Mrs. Talamantes is entitled to relief.

Astrid Galindo Sardoz

Subscribed and sworn to before me this 11th day of April, 1983.

Ethel R. Ortenburger

Notary Public

My commission expires:
8-9-86

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

ASTRID GALINDO SARDOZ and MARIA SOTO VDA. DE TALAMANTES as co-personal representatives of the Estate of BERNARDO TALAMANTES, a/k/a HECTOR M. BAYLON, deceased,

Appellants,

vs.

KENT NOWLIN CONSTRUCTION COMPANY,

Appellee.

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of April, 1983, a copy of the foregoing Motion for Leave to Proceed in Forma Pauperis was mailed with first class postage prepaid to Zachary L. McCormick, Counsel for Defendant, at Modrall, Sperling, Roehl, Harris & Sisk, PO Box 2168, Albuquerque, NM 87103 and to the Attorney General of the State of New Mexico, Paul Bardacke, PO Drawer 1508, Batann Memorial Building, Santa Fe, NM 87503.

Respectfully submitted,

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Counsel for Appellants

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No. 82-6614

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

ASTRID GALINDO SARDOZ and MARIA SOTO VDA DE TALAMANTES as co-personal representatives of the Estate of BERNARDO TALAMANTES, a/k/a HECTOR M. BAYLON, deceased,

Appellants,

vs.

KENT NOWLIN CONSTRUCTION COMPANY,

Appellee.

SUPPLEMENTAL AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO APPEAL IN FORMA PAUPERIS

STATE OF NEW MEXICO)
) ss
COUNTY OF BERNALILLO)

I, ASTRID GALINDO SARDOZ, being first duly sworn, depose and say that I am an Appellant in the above-entitled case. In further support of our motion to proceed on appeal without being required to prepay fees, costs or give security therefore I state:

1. I am the Mexican Consul, with offices situated in Albuquerque, New Mexico.

2. As a regular part of my duties on behalf of the Government of Mexico I regularly serve as personal representative for non-resident Mexican citizens who wish to invoke the jurisdiction of American courts, and that I am serving in that capacity on behalf of Maria Soto Vda De Talamantes, who is the real party in interest in this action.

3. Maria Soto Vda De Talamantes is a citizen of Mexico, and she resides in the small village of Villa Coronado in the State of Chihuahua, Mexico.

4. Because of Mrs. Talamantes' poverty she is unable to pay the costs of said proceedings or to give security therefore. I believe she is entitled to redress in this action.

I further swear that the responses which I have made to the questions and instructions below relating to Mrs. Talamantes' ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?

No.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

Mrs. Talamantes takes in washing and does odd jobs in the village of Villa Coronado. Her compensation is primarily in food and hand-me-down clothing and school supplies for her minor children. She receives very little in cash income, and never more than the equivalent of $10 per month.

3. Do you own any cash or checking or savings accounts?

No.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

No.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

Maria de los Angeles Talamantes	- daughter
Rita Talamantes	- daughter
Norma Susana Talamantes	- daughter
Juan Bernardo Talamantes	- son
Antonio Talamantes	- son
Jose Roman Talamantes	- son

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Astrid Galindo Sardoz

Subscribed and sworn to before me this 20th day of April, 1983.

Notary Public

My commission expires:

January 19 1986

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MAY 27 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-6614

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

ASTRID GALINDO SARDOZ and
MARIA SOTO VDA DE TALAMANTES
as co-personal representatives
of the Estate of BERNARDO TALAMANTES,
a/k/a HECTOR M. BAYLON, deceased,

Appellants,

vs.

KENT NOWLIN CONSTRUCTION COMPANY,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF NEW MEXICO

MOTION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

Appellee moves the Court to dismiss the appeal herein, or in the alternative, to affirm the decision of the Supreme Court of New Mexico, on the grounds that the question actually raised in this appeal was not preserved as an issue in the trial court and, further, it is manifest that the issue which was preserved and on which the decision of the cause depends is so insubstantial as to need no further argument.

I. THE STATUTES INVOLVED AND THE NATURE OF THE CASE.

A. The Statutes.

Although the question presented at the outset of the Jurisdictional Statement refers only to the "Exclusive Remedy" provisions of the New Mexico Workmen's Compensation Act (§§ 52-1-8 and 52-1-9 NMSA 1978), Appellants' argument in their Jurisdictional Statement is actually based upon the "confluence" of distinct and separate statutes--the Exclusive Remedy provisions, and the "Exclusion" provision (§ 52-1-52 NMSA 1978). None of these statutes involve alienage in any way. The Exclusive Remedy provisions apply to all persons, regardless of their citizenship or residence, while the Exclusion provision differentiates only on the basis of residence within or without the United States. Appellants' continued references to "alienage" are simply misstatements of the issue.

The Appellants have misstated the issue in an effort to create jurisdiction in this Court. The real thrust of this appeal is not whether the Exclusive Remedy provisions are constitutional or unconstitutional, but whether the provision of the New Mexico Workmen's Compensation Act which excludes non-United States resident dependents and relatives of an injured workman from recovery of any benefits is

constitutional. It is this Exclusion provision, not the Exclusive Remedy provisions, which barred the deceased workman's family from any recovery beyond the medical and funeral expenses which were paid pursuant to the New Mexico Workmen's Compensation Act. The Exclusion provision, however, could not be appealed in the context of this case, because the Appellants did not litigate or attempt to litigate a workmen's compensation claim for the recovery of benefits, nor did they preserve the issue of the constitutionality of the Exclusion provision or file a timely appeal on that question.

The relevant statutory provisions in this case are Sections 52-1-8, 52-1-9 (the Exclusive Remedy provisions), and 52-1-52 (the Exclusion provision) NMSA 1978, which read as follows:

> EXCLUSIVE REMEDY PROVISIONS:
>
> 52-1-8. Defenses to action by employee. In an action to recover damages for a personal injury sustained by an employee while engaged in the line of his duty as such, or for death resulting from personal injuries so sustained in which recovery is sought upon the ground of want of ordinary care of the employer, or of the officer, agent or servant of the employer, it shall not be a defense:
>
> A. that the employee, either expressly or impliedly, assumed the risk of the hazard complained of as due to the employer's negligence;
>
> B. that the injury or death was caused, in whole or in part, by the want of ordinary care of a fellow servant; and
>
> C. that the injury or death was caused, in whole or in part, by the want of ordinary care of the injured employee where such want of care was not willful.
>
> Any employer who has complied with the provisions of the Workmen's Compensation Act [52-1-1 to 52-1-69 NMSA 1978] relating to insurance, or any of the employees of the employer, including management and supervisory employees, shall not be subject to any other liability whatsoever for the

death of or personal injury to any employee, except as provided in the Workmen's Compensation Act, and all causes of actions, actions at law, suits in equity and proceedings whatever, and all statutory and common-law rights and remedies for and on account of such death of, or personal injury to, any such employee and accruing to any and all persons whomsoever, are hereby abolished except as provided in the Workmen's Compensation Act.

* * *

52-1-9. Right to compensation; exclusive. The right to the compensation provided for in this act [52-1-1 to 52-1-69 NMSA 1978], in lieu of any other liability whatso- ever, to any and all persons whomsoever, for any personal injury accidentally sustained or death resulting therefrom, shall obtain in all cases where the following conditions occur:

A. at the time of the accident, the employer has complied with the provisions thereof regarding insurance;

B. at the time of the accident, the employee is performing service arising out of and in the course of his employment; and

C. the injury or death is proximately caused by accident arising out of and in the course of his employment and is not intentionally self-inflicted.

* * *

EXCLUSION PROVISION:

52-1-52. [Exemption of compensation from claims of creditors, attachment, garnishment or execution; payees; residents of foreign countries barred from receiving payment.] Compensation shall be exempt from claims of creditors and from any attachment, garnishment or execution, and shall be paid only to such workman or his personal representative, or such other persons as the court may, under the terms hereof, appoint to receive or collect the same. No claim or judgment for compensation, under this act [52-1-1 to 52-1-69 NMSA 1978], shall accrue to or be recovered by relatives or dependents not residents of the United States at the time of the injury of such workman.

B. The Proceedings Below.

This matter arises out of an industrial accident that resulted in the death of Bernardo Talamantes ("Decedent") on or about November 25, 1977. Decedent was a citizen of Mexico. Prior to his death, he illegally entered the United States and obtained employment under the name of Hector M. Baylon. All of Decedent's relatives and dependents were residents of Mexico at the time of his death.

In May 1978, a personal representative of the estate of Decedent filed suit in Bernalillo County, New Mexico. The named defendants included Kent Nowlin Construction Company, Inc. ("Kent Nowlin"), Decedent's employer at the time of his death; and Mountain States Mutual Casualty Company ("Mountain States"), Kent Nowlin's workmen's compensation insurance carrier. A true and correct copy of the Complaint is attached hereto and made a part hereof as Appendix "A". Count One of the Complaint was a workmen's compensation claim against Kent Nowlin and Mountain States. In relevant part, it asserted:

> VI. Notwithstanding the provisions of Section 59-10-21, N.M.S.A., the widow and children of Bernardo Talamantes are entitled to Workmen's Compensation benefits pursuant to the New Mexico Workmen's Compensation Act. Such purported limitation in that section is unconstitutional and should be stricken by the court.[1]

Count Two of the Complaint was couched in terms of a wrongful death action against Kent Nowlin. In pertinent part, that Count stated:

---

[1]Section 59-10-21 NMSA (1953 Comp.) was the non-U.S. resident dependent exclusion in the 1953 Compilation of the New Mexico Statutes Annotated. Section 52-1-52 NMSA 1978 is the same statute in the current compilation.

> II. In the alternative to the allegations contained in Count One, the Plaintiffs state that the Workmen's Compensation Act does not apply to the death of Bernardo R. Talamantes. Plaintiffs are entitled to proceed in common law.

Therefore, Appellants originally proceeded against Kent Nowlin on the alternate theories of workmen's compensation and wrongful death (in the event that the non-United States resident dependent Exclusion provision of Section 52-1-52, supra, proved to be valid.)

At the time the Complaint was filed, there was already pending in the New Mexico Supreme Court the case of Pedrazza v. Sid Fleming Contractor, Inc., 94 N.M. 59, 607 P.2d 597 (1980), a workmen's compensation action which involved the constitutionality of the Exclusion provision. The plaintiffs in Pedrazza were residents of Mexico and were the dependents of a Mexican citizen who was killed in an industrial accident while working in the United States. The Pedrazza plaintiffs were claiming benefits under the New Mexico Workmen's Compensation Act and were challenging the constitutional validity of the Exclusion provision.

With Pedrazza already pending in the New Mexico Supreme Court, the parties to the instant case filed a joint motion for a stay of proceedings until Pedrazza was decided. The motion was granted and both parties herein then participated in the Pedrazza appeal as amicus curiae.

In February, 1980, the New Mexico Supreme Court held in Pedrazza that the Exclusion provision was constitutional. In July 1980, Appellants moved to amend their Complaint to dismiss their workmen's compensation claim and proceed against Kent Nowlin only on the wrongful death claim. Copies of the motion and First Amended Complaint are attached hereto and made a part hereof as Appendices "B" and "C". The Order granting

the Appellants' motion was entered on August 6, 1980, and specified that the workmen's compensation claim was dismissed with prejudice. A copy of the Order is attached hereto as Appendix "D". The Order recited, however, that Kent Nowlin's workmen's compensation insurer had paid to the Appellants medical and funeral expenses for the death of the Decedent. (These benefits do not fall within the Exclusion by virtue of Section 52-1-46 NMSA 1978.)

The case then proceeded as a wrongful death action against Kent Nowlin. Kent Nowlin raised the defense of Sections 52-1-8 and 52-1-9, supra, the Exclusive Remedy provisions. That issue was preserved for appeal throughout the proceedings and the New Mexico Supreme Court ultimately ruled that the Exclusive Remedy provisions did bar the Appellants' wrongful death action against Kent Nowlin, holding:

> ...The plain meaning of these provisions is that the Act is an exclusive remedy, unless otherwise provided for in the Act. The Act does not make an exception, and we will not create one. * * * We hold that non-resident dependents residing outside of the United States at the time of the worker's injury are barred from pursuing their common law remedies due to the exclusive remedy provisions under the Act. To hold otherwise would subject employers to unlimited liability and defeat the underlying principles of the Act. 658 P.2d at 1117, 1118.

Appellants have appealed to this Court claiming that there is a Federal Constitutional issue based upon the New Mexico Supreme Court's interpretation of the Exclusive Remedy provisions of the New Mexico Workmen's Compensation Act. This is a misstatement designed to overcome the fact that Appellants failed to preserve the issue of the constitutionality of the Section 52-1-52 Exclusion provision.

II. ARGUMENT

The Issue Raised In The Jurisdictional Statement Was Not Preserved For Appeal. Even If It Had Been Preserved The Case Presents No Substantial Constitutional Question Requiring Further Argument.

The Exclusive Remedy provisions are neutral in their operation--they operate against all classes of persons equally whether they be United States citizens or aliens. The Appellants' real quarrel is with the Exclusion provision of the New Mexico Workmen's Compensation Act, and they have recognized that fact in the Jurisdictional Statement with the following language:

> This construction of the exclusive remedy provision when considered in tandem with Section 52-1-52 of the Act absolutely bars the Talamantes family from any claim for the wrongful death of Bernardo Talamantes. Section 52-1-52 denies recovery otherwise available under the Act to a worker's alien relatives or dependents if they are residing outside of the United States at the time of the worker's injury....(Jurisdictional Statement, p. 4).

Assuming, arguendo, that there is a Federal Constitutional question involved here, that question must turn on the validity of the Exclusion provision. Appellants' problem is that they have failed to either properly preserve that issue for appeal or to file a timely appeal on that question. As stated above, they originally filed a workmen's compensation claim against Kent Nowlin but then voluntarily amended their Complaint in 1980 to abandon that claim with prejudice. They did not again raise the question of the validity of the Exclusion at any point in the trial or the appellate process.

Appellants elected to try this action as a wrongful death action, not a workmen's compensation case. They now appeal from the fact that they are not allowed to maintain the wrongful death action in the face of the clear mandate of the

New Mexico Exclusive Remedy provisions. The Exclusion provision was not challenged in this case, and the claim for a recovery of workmen's compensation benefits was, in fact, abandoned when the Appellants voluntarily amended their Complaint in the trial court. Therefore, it would be inappropriate for them to now challenge on appeal the constitutionality of the Exclusion provision. Cf. Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 37 (1976); Head v. N.M. Board of Exam. in Optometry, 374 U.S. 424, 432 n.12 (1963).

If the Appellants are not, in fact, implicitly challenging the constitutionality of the Exclusion provision, but are challenging only the Exclusive Remedy provisions, then the decision of the New Mexico Supreme Court should be summarily affirmed. The Exclusive Remedy provisions are typical of workmen's compensation statutes. This Court in United States v. Demko, 385 U.S. 149, 151 (1966), reiterated its recognition of the fact that workmen's compensation actions are substitutes for, not supplements to, common-law tort actions, reaffirming its holdings in Johansen v. United States, 343 U.S. 427 (1952), and Patterson v. United States, 359 U.S. 495 (1959). The constitutionality of exclusive remedy provisions, when attacked, has repeatedly been upheld. That issue was resolved by this Court in 1916 in Northern Pacific Railway Co. v. Meese, 239 U.S. 614, 620 (1916). More recent decisions from the Courts of Appeals have reached the same results. Davidson v. Hobart Corp., 643 F.2d 1386 (10th Cir. 1981); Keller v. Dravo Corp., 441 F.2d 1239 (5th Cir. 1971); see also 2A Larson, Workmen's Compensation Law, § 65.20.

The rationale for exclusive remedy provisions was articulated by the New Mexico Supreme Court in Roseberry v. Phillips Petroleum Co., 70 N.M. 19, 21, 369 P.2d 403 (1962):

> The language of the New Mexico statute is very restrictive and all embracing . . . it expressly limits the liability of the employer and abolishes all rights and remedies of every person whomsoever against the employer except as provided by the Act. The basis upon which the Workmen's Compensation Law rests is that it imposes upon the employer an absolute, though limited, liability, not based upon the principle of tort but upon compensation to the injured employee regardless of fault and free from the common-law defenses of assumption of risk, contributory negligence and negligence of a fellow-employee, in exchange for a release from the unlimited liability to which he was theretofore subject upon the theory of negligence . . . .

There is nothing constitutionally impermissible about the New Mexico Exclusive Remedy provision. Although it deprives a person claiming benefits as a result of an industrial accident of remedies at common-law, by statute or otherwise, those remedies are not "property" and there is no denial of due process by enforcing such an exclusive remedy provision. Mondou v. New York, New Haven, & Hartford Railroad Co., 223 U.S. 1 (1912); Keller v. Dravo Corp., 441 F.2d 1239, 1242 (5th Cir. 1971).

The New Mexico Exclusive Remedy provisions also present no equal protection violation. They apply to all persons, citizens or aliens, residents or non-residents. All persons are treated precisely the same under that statute.

Finally, the Exclusive Remedy provisions do not violate the supremacy clause of the Federal Constitution by conflicting with a treaty between the United States and Mexico. The treaty in question, the 1831 Treaty of Amity, Commerce and Navigation between the United States of America and the United Mexican States, 8 Stat. 410, states that citizens of Mexico are to have access to the courts of the United States "on the same terms which are usual and customary with the natives or citizens" of the United States, and that

they "shall enjoy, in every respect, the same rights and privileges, either in prosecuting or defending their rights of personal property, as citizens of the country where the cause may be tried." Since all persons, regardless of citizenship, are equally limited by the Exclusive Remedy provisions, they in no way conflict with the Treaty. The Exclusive Remedy provisions have no greater or lesser application to citizens of Mexico than to citizens of the United States, or for that matter of any other country. There is no violation of the terms of the treaty with Mexico, and hence no violation of the Supremacy Clause. So, too, the Exclusion provision operates no differently on citizens of Mexico than on citizens of the United States. It is, as pointed out previously, a distinction based upon residence, not upon citizenship. The New Mexico Court of Appeals in Perez v. Health and Social Services, 91 N.M. 334, 336, 573 P.2d 689, 691 (1978), noted that an undocumented alien could be a "resident" for purposes of the workmen's compensation law. Conversely, a United States citizen who is a dependent of an injured workman would have no right to recover workmen's compensation benefits if he resides outside of the United States. He is treated no differently under the statute than a citizen of Mexico. Thus, even if the Exclusion question had been preserved as an issue for appeal, it would present no equal protection or supremacy clause issue.

There is nothing unconstitutional about a bona fide residence qualification being imposed as a requirement for obtaining benefits under a state law. This Court's most recent pronouncement on this point was made earlier this month in Martinez v. Bynum, ____ U.S. ____, No. 81-857 (May 2, 1983). The Court in Martinez relied upon prior opinions, including

Memorial Hospital v. Maricopa County, 415 U.S. 250, 255, 267 (1974); Dunn v. Blumstein, 405 U.S. 330 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969), and found a bona fide residence requirement to be constitutionally permissible.

The New Mexico Exclusion provision simply provides that a person, to obtain benefits under the New Mexico Workmen's Compensation Act, be a resident of the United States. It sets no durational requirement, such as those which have been challenged in other cases like Shapiro, supra. Therefore, even if it were properly on appeal, the Exclusion provision would pass constitutional scrutiny. Indeed, what the Appellants seem to seek is not equal protection under the law, but favored treatment. By implication from their argument, the Exclusion should be left in the New Mexico Workmen's Compensation Act, but the Exclusive Remedy provisions should be modified by judicial interpretation to permit non-resident aliens to maintain common-law and statutory causes of action against an employer for death or injury to a workman in an industrial accident. This is a right afforded to neither citizens of the United States nor alien residents in the United States. Such a result would itself conflict with the equal protection requirements of the Fourteenth Amendment.

In short, Appellants' appeal should be dismissed, or the decision of the New Mexico Supreme Court on the Exclusive Remedy provisions of the New Mexico Workmen's Compensation Act should be summarily affirmed. The statute and the decision of the New Mexico Supreme Court are in conformity with the precedents of this Court and others which have considered the question, and both on its face and as applied, the statute makes no impermissible distinction between classes of persons. It violates neither the equal protection clause, the due process clause,

nor the supremacy clause. Insofar as the appeal centers on the Exclusion provision in the New Mexico Workmen's Compensation Act, it should be dismissed, since that claim was abandoned voluntarily by the Appellants before this matter ever came on to trial.

III. CONCLUSION

Appellee respectfully moves this Court either to dismiss this appeal because it seeks to have considered a question which was abandoned in the trial court below, or else to affirm summarily the opinion of the New Mexico Supreme Court since the question preserved for appeal, the validity of the Exclusive Remedy provision, presents issues which are so insubstantial as not to justify further argument and which have previously been resolved by this Court and others.

Respectfully submitted,

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STATE OF NEW MEXICO COUNTY OF BERNALILLO

IN THE DISTRICT COURT

JUAN BARONA and
MARIA SOTO VDA DE TALAMANTES as
co-personal representatives of the
Estate of BERNARDO R. TALAMANTES
a/k/a HECTOR M. BAYLON, Deceased,

Plaintiffs,

vs.

KENT NOWLIN CONSTRUCTION COMPANY, INC.,
MOUNTAIN STATES MUTUAL CASUALTY COMPANY
and PUBLIC SERVICE COMPANY OF NEW MEXICO,

Defendants.

CV-78-03123

No.

CLERK DISTRICT COURT

C O M P L A I N T

COUNT ONE

For Count One of this Complaint, the Plaintiffs state:

I

That they were duly appointed personal representatives of the Estate of Bernardo R. Talamantes a/k/a Hector M. Baylon on March 21, 1978, in the Probate Court of Bernalillo County, Probate No. 78-99.

II

That at all times material herein, Plaintiffs decedent was a resident of Bernalillo County employed by the Defendant Kent Nowlin Construction Company. The incident complained of in this Complaint occurred in Bernalillo County, New Mexico. The Defendant Kent Nowlin Construction Company, Inc., is a New Mexico corporation doing business in Bernalillo County, New Mexico. The Defendant Mountain States Mutual Casualty Company is an insurance carrier doing business in the State of New Mexico and is a compensation carrier for Kent Nowlin Construction Company, Inc. The Defendant Public Service Company of New Mexico is a New Mexico corporation doing business in Bernalillo County, New Mexico.

III

At all times material herein, the decedent was an employee of Kent Nowlin Construction Company, Inc. enjoying average weekly earnings in an amount that would qualify him and his estate to receive maximum Workmen's Compensation benefits.

IV

On or about November 25, 1977, while an employee of the Defendant Kent Nowlin Construction Co., Inc. and in the course and scope of his employment, the decedent suffered death by electrocution as the result of his employers' crane coming in contact with a high line wire at 440 Atrisco, S.W., in Albuquerque, New Mexico.

V

Decedent is survived by his wife, Maria Soto Vda de Talamantes and their six minor children, namely:

1. Maria Talamantes, daughter;
2. Rita Talamantes, daughter;
3. Norma Suzanna Talamantes, daughter;
4. Juan Bernardo Talamantes, son;
5. Antonio Talamantes, son; and
6. Jose Roman Talamantes, son.

VI

Notwithstanding the provisions of Section 59-10-21, N.M.S.A., the widow and children of Bernardo Talamantes are entitled to Workmen's Compensation benefits pursuant ot the New Mexico Workmen's Compensation Ac Such purported limitation in that section is unconstitutional and should be stricken by the court.

VII

Pursuant to Section 59-10-7, N.M.S.A., the plaintiffs are entitled to an increase in compensation based upon the failure of defendant Kent Nowlin Construction Co., Inc. to provide adequate safety devices, e.g., failure to sleeve or insulate the power line and the positioning of the crane within ten feet of an energized power line.

WHEREFORE, the Plaintiffs pray judgment against the Defendants Kent Nowlin Construction Co., Inc. and Mountain States Mutual Casualty Co. for Workmen's Compensation benefits in the amount of $142.60 for a period of 600 weeks and for such other and further relief as the court may deem proper.

COUNT TWO

Come now the Plaintiffs and for Count Two of this Complaint state:

I

Plaintiffs incorporate by reference the factual allegations contained in Count One.

II

In alternative to the allegations contained in Count One, the Plaintiffs state that the Workmen's Compensation Act does not apply to the death of Bernardo R. Talamantes. Plaintiffs are entitled to proceed in common law.

III

On or about November 25, 1975, decedent's employer, Kent Nowlin Construction Company, through their employees, carelessly and negligently operated a crane at 440 Atrisco, S.W. so as to cause it to come in to contact with a high line energized power line. That such negligence more specifically includes, but is not limited to, the following acts of negligence:

1. Failure to notify the power company of activities with the crane;

2. Positioning said crane within ten feet of an energized power line;

3. Failure to sleeve or insulate the power line;

4. Failure to provide a safe place to work and in failing to warn the decedent of hazards attendant with such activities;

5. Failure of the crane operator to keep a proper lookout and avoid contact with said power lines; and,

6. Failure to instruct the decedent concerning how to avoid such injury.

IV

As a direct and proximate result of the negligence of such

employer, Kent Nowlin Construction Company, Bernardo R. Talamantes suffered death by electrocution.

WHEREFORE, the Plaintiffs pray judgment against the Defendant Kent Nowlin Construction Company, Inc. for damages in the sum of $225,000.00, plus costs of this action and such other relief as the court may deem proper.

COUNT THREE

As Count Three of this Complaint, the Plaintiffs state:

I

That they incorporate by reference the factual allegations contained in Count One and Count Two as though fully set forth herein.

II

That the Defendant Public Service Company of New Mexico negligently maintained the power line at 440 Atrisco, S.W., in Albuquerque, New Mexico, and as a direct and proximate cause and result of such negligence, Bernardo R. Talamantes died from electrocution.

III

That this Defendant's negligence referred to above, is more specifically described as including, but not limited to:

1. Maintaining the power line at lower than minimum standards;

2. Failure to advise persons in the vicinity of said power line of the dangers attendant to such activity;

3. Failure to take steps to avoid electrocution contact;

4. Failure to insulate such power line; and,

5. The creation of such a maze of wires at different levels, different heights and different directions so as to confuse and subject persons in the vicinity of said high line wires to injury.

WHEREFORE, the Plaintiffs pray judgment against the Defendant Public Service Company of New Mexico for damages in the amount of $225,000.00, plus costs of this action and such other relief as the court may deem proper.

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STATE OF NEW MEXICO COUNTY OF BERNALILLO

IN THE DISTRICT COURT

JUAN BARONA and MARIA SOTA VDA DE TALAMANTES as co-personal representatives of the Estate of BERNARDO TALAMANTES a/k/a HECTOR M. BAYLON, Deceased,

Plaintiffs,

v.

No. CV 78-3123

KENT NOWLIN CONSTRUCTION COMPANY, INC., MOUNTAIN STATES MUTUAL CASUALTY COMPANY and PUBLIC SERVICE COMPANY OF NEW MEXICO,

Defendants.

ENDORSED
FILED IN MY OFFICE THIS
AUG 6 1980
DISTRICT COURT

MOTION TO AMEND COMPLAINT

COME NOW the Plaintiffs and move this Court to allow Plaintiffs to amend their complaint to dimiss Mountain States Mutual Casualty Company as a party, dismiss the Workmen's Compensation count against Defendant Kent Nowlin Construction Company, and add a negligence per se charge against Defendant Kent Nowlin Construction Company.

As grounds therefor, Plaintiffs state:

1. In light of the recent New Mexico Supreme Court case, Pedrazza v. Sid Fleming Contractor, Inc., Vol. 19, No. 10, March 6, 1980 (Sup. Ct. No. 12, 389), a Workmen's Compensation case which appears to hold that a non-resident of the United States was not intended by the legislature to receive Workmen's Compensation benefits, Plaintiffs as residents and citizens of Mexico dismiss the Workmen's Compensation count of their complaint against Defendant Kent Nowlin and consequently against Kent Nowlin's Workmen's Compensation carrier, Mountain States Mutual Casualty Company.

2. Plaintiffs further amend to add a negligence per

se charge to their complaint for Kent Nowlin's failure to comply with the Hours of Labor and Safety on Public Works Act, 40 USC, §327-333.

Respectfully submitted,

ATTORNEYS FOR PLAINTIFFS

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By: Will H Carpenter

I hereby certify that a true copy of the foregoing was mailed to all counsel of record this 2 day of July, 1980.

By: Will H Carpenter

STATE OF NEW MEXICO COUNTY OF BERNALILLO

IN THE DISTRICT COURT

ESTELA E. GUTIERREZ and
MARIA SOTO VDA DE TALAMANTES as
co-personal respresentatives of the
estate of BERNARDO R. TALAMANTES
a/k/a HECTOR M. BAYLON, Deceased

No. CV-78-3123

Plaintiffs,

ENDORSED
FILED IN MY OFFICE THIS
AUG 6 1980
CLERK DISTRICT COURT

VS.

KENT NOWLIN CONSTRUCTION COMPANY,

Defendant.

FIRST AMENDED COMPLAINT

COMES NOW the Plaintiffs and for their cause of action state:

I.

That they were duly appointed personal representatives of the Estate of Bernardo R. Talamantes a/k/a Hector M. Baylon on March 21, 1978, in the Probate Court of Bernalillo County, Probate No. 78-99.

II.

That at all times material herein, Plaintiffs' decedent was a resident of Bernalillo County, New Mexico. Defendant Kent Nowlin Construction Company, is a New Mexico Corporation doing business in Bernalillo County, New Mexico.

III.

That on or about November 25, 1977, while an employee of the Defendant Kent Nowlin Construction Company, the

decedent suffered death by electrocution as the result of his employers' crane coming in contact with a high line wire at 440 Atrisco S.W., in Albuquerque, New Mexico.

Defendant Kent Nowlin Construction Company was the contractor for the City of Albuquerque for the purpose of constructing and repairing a public road in Albuquerque, New Mexico, at the time and place of decedents death.

IV.

Defendant Kent Nowlin Construction Company required Plaintiff, a laborer and employee, to work in surroundings hazardous and dangerous to his health and safety in violation of the Hours of Labor and Safety on Public Works Act, 40USC§327-333, and as set forth more specifically within the regulations of this Act, 44 Fed. Reg. 8577-8640, February 9, 1979. Defendants' violations of this act include, but are not limited to the following:

1. Failure to train, instruct and educate the Plaintiff in the recognition, and avoidance and prevention of unsafe conditions,

2. Failure to conspicuously post hazard warnings and instructions on the crane,

3. Failure to deenergize and visably ground electrical lines or erect an insulated barrier to prevent contact with such lines,

4. Failure to maintain a distance of 10 feet between the power lines and the crane,

5. Failure to designate an employee to observe clearance to maintain the desired distance,

6. Failure to provide safety and warning devices such as boom guards, insulating links, or proximity warning devices.

V.

The failure of Defendant Kent Nowlin Construction Company to comply with the provisions of the Hours of Labor and Safety on Public Works Act and the regulations promulgated pursuant to that Act constitutes negligence per se.

VI.

Apart from the statutory violation, employees of Defendant, acting within the course and scope of their employment, were otherwise negligent with such negligence consisting, inter alia, of the following:

1. Failure to notify the power company of activities with the crane;

2. Positioning said crane within ten feet of an energized power line;

3. Failure to sleeve or insulate the power line;

4. Failure to provide a safe place to work and in failing to warn the decedent of hazards attendant with such activities;

5. Failure of the crane operator to keep a proper lookout and avoid contact with said power lines;

6. Failure to provide sufficient number of workmen to avoid injury, including the use of a spotter;

7. Failure to provide safe and proper equipment

8. Failure to instruct and warn the decedent concerning how to avoid such injury.

As a direct and proximate result of the negligence of such employer, Kent Nowlin Construction Company, Bernardo R. Talamantes suffered death by electrocution.

WHEREFORE, the Plaintiffs pray judgment against the Defendant Kent Nowlin Construction Company for damages in the sum of $325,000.00, plus cost of this action and such other relief as the court may deem proper.

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BY: William H. Carpenter

I Hereby certify that a true copy of the foregoing was mailed to the opposing counsel of record on this _____ day of _____, 19_____.

WILLIAM H. CARPENTER

STATE OF NEW MEXICO COUNTY OF BERNALILLO

IN THE DISTRICT COURT

ENDORSED
FILED IN MY OFFICE THIS
AUG 6 1980
CLERK DISTRICT COURT

JUAN BARONA and MARIA SOTA VDA DE TALAMANTES as co-personal representatives of the Estate of BERNARDO TALAMANTES a/k/a HECTOR M. BAYLON, Deceased,

Plaintiffs,

v. No. CV 78-3123

KENT NOWLIN CONSTRUCTION COMPANY, INC., MOUNTAIN STATES MUTUAL CASUALTY COMPANY and PUBLIC SERVICE COMPANY OF NEW MEXICO,

Defendants.

ORDER

This matter having come before the Court on Plaintiff's Motion to Amend Complaint, and the Court having been fully advised, finds that as a result of the death by electrocution on November 25, 1977, of Bernardo R. Talamantes, a/k/a Hector M. Baylon, Mountain States Mutual Casualty Company on its behalf and on behalf of the employer, Kent Nowlin Construction Company, Inc., paid $1515 for medical and funeral expenses, and the Court further finding that good cause exists for the filing of a First-Amended Complaint alleging additional grounds for negligence against Defendant Kent Nowlin Construction Company, Inc., it is therefore

ORDERED:

1. That all claims by the Plaintiffs for death benefits under the New Mexico Workmen's Compensation Act be, and they hereby are, dismissed with prejudice; and

2. That Plaintiffs be, and they hereby are, allowed to file an Amended Complaint against Defendant Kent Nowlin Con-

struction Company, Inc., alleging additional grounds of negligence.

JACK L. LOVE
DISTRICT COURT JUDGE

Approved as to form:

WILLIAM H. CARPENTER
Attorney for Plaintiffs

MODRALL, SPERLING, ROEHL, HARRIS & SISK

By
JAMES A. PARKER
Attorneys for Defendants
Kent Nowlin Construction Co., Inc.
and Mountain States Mutual Casualty Co.

Office - Supreme Court
FILED
JUN 3 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-6614

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

ASTRID GALINDO SARDOZ and MARIA SOTO VDA. DE TALAMANTES as co-personal representatives of the Estate of BERNARDO TALAMANTES, a/k/a HECTOR M. BAYLON, deceased,

Appellants,

vs.

KENT NOWLIN CONSTRUCTION COMPANY,

Appellee.

JUN 16 PAGE 7

APPELLANTS' BRIEF IN OPPOSITION TO THE MOTION TO DISMISS OR AFFIRM

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No. 82-6614

IN THE

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October Term, 1982

ASTRID GALINDO SARDOZ and MARIA SOTO VDA. DE TALAMANTES as co-personal representatives of the Estate of BERNARDO TALAMANTES, a/k/a HECTOR M. BAYLON, deceased,

Appellants,

vs.

KENT NOWLIN CONSTRUCTION COMPANY,

Appellee.

APPELLANTS' BRIEF IN OPPOSITION TO THE MOTION TO DISMISS OR AFFIRM

Pursuant to Sup. Ct. R. 16.5, Appellants respectfully submit this response to the Motion to Dismiss or Affirm filed by Appellee.

POINT I

THE CONSTITUTIONAL QUESTIONS RAISED IN THE JURISDICTIONAL STATEMENT WERE PRESERVED FOR APPEAL.

Contrary to the suggestion made by appellee, each of the constitutional questions raised in the Jurisdictional Statement was squarely presented to the New Mexico Supreme Court. Indeed, the rehearing in the Court below focussed substantially on the constitutional questions which are now being presented for review. In fact, upon the initial granting of the rehearing, the New Mexico Supreme Court accepted supplemental briefs on the constitutional questions from both sides. On October 25, 1982, appellants herein filed their Supplemental

'Brief in the court below (Attached hereto as Appendix A) which in Point II directly raised each of the constitutional issues covered in the Jurisdictional Statement. Moreover, appellee responded in a Supplemental Brief, filed on November 4, 1982. Attached hereto as Appendix B. In its response appellee also dealt with each of the constitutional claims presented in the Jurisdictional Statement. Thus, these claims were made explicit in the state court, were passed on by the court,[1] and were thereby properly preserved for presentation to this Court on appeal. See R. Stern & E. Gressman, Supreme Court Practice 163 (5th ed 1978).

Appellee urges that "Insofar as the appeal centers on the exclusion provision in the New Mexico Workmen's Compensation Act, it should be dismissed, since that claim was abandoned voluntarily by the appellants before this matter ever came on to trial." Motion to Dismiss or Affirm at 12. This proposition is wrong for two reasons. First, the substantial constitutional questions raised in the Jurisdictional Statement are not based on challenges to either the exclusion provision or the exclusive remedy provision in isolation, but rather, as the very portion of the Jurisdictional Statement cited by appellee indicates, see Motion to Dismiss or Affirm at 7, appellants challenge the exclusive remedy provision as construed by the state supreme court below as it operates in tandem with Section 52-1-52 of the Workmen's Compensation Act (the exclusion provision).

Second, there is a cruel irony in this argument for dismissal. Its essential contention is that Mrs. Talamantes and her children should, for procedural reasons, be deprived of a

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[1]The ruling of January 14, 1983 withdrawing the prior grant of a reharing, from which this appeal follows, was a decision sustaining the constitutional validity of the tandem operation of the two challenged state statutes.

hearing on their substantial constitutional claims because, after unsuccessfully joining the challenge to the exclusion provision in Pedrazza, they followed the express guidance of the state supreme court in that opinion and pursued their "other avenues of recovery." Pedrazza v. Sid Fleming Contractor, Inc., 94 N.M. 59, 63, 607 P.2d 597, 599 (1980). Such an argument merely serves to highlight the gross inequity inflicted on Mrs. Talamantes.

POINT II.

THE QUESTIONS PRESENTED IN THE JURISDICTIONAL STATEMENT ARE SUBSTANTIAL.

Appellants' essential constitutional claims, based in due process, equal protection, and interference with federal control over immigration policy, discussed in detail in the Jurisdictional Statement, are substantial and merit plenary review in this Court.[2] Appellee's arguments to the contrary are grounded in an attempt to characterize these claims as directed to the exclusive remedy provision and the exclusion provision independently and in isolation from each other. Having created this "strawman," appellee seeks to defend the constitutionality of each provision independently. This line of argumentation entirely misses the point of the Jurisdictional Statement -- appellants' substantial constitutional

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[2]Appellants hereby abandon the treaty argument set forth in Point IV, A of the Jurisdictional Statement because additional research establishes that it is not well founded.

As noted in the Jurisdictional Statement, the 1831 Treaty of Amity, Commerce, and Navigation between the United States of America and the United Mexican States, 8 Stat. 410 was incorporated into the Treaty of Guadalupe Hidalgo, 9 Stat. 922, art. XVII (1848). Appellants' counsel have just discovered, however, that consistent with the provisions of the 1848 Treaty, the Treaty of Amity, Commerce, and Navagation was terminated by Mexico effective November 30, 1881. C. Bevans, Treaties and Other International Agreements of the United States of America, 1776-1949, at 764. As a result, the provisions of the 1831 treaty cannot support a supremacy clause claim. All other questions raised in the Jurisdictional Statement are substantial, remain at issue, and merit plenary consideration.

claims arise from the tandem operation of the two provisions which denies Mrs. Talamantes and her children any claim, remedy or compensation for the death of their husband and father.

CONCLUSION

Because the constitutional questions presented in the Jurisdictional Statement are substantial and were properly preserved for appeal, appellants respectfully request that the Court deny the motion, note probable jurisdiction, and set this case for plenary consideration, including briefs on the merits and oral argument in support thereof.

Respectfully submitted,

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IN THE SUPREME COURT OF THE

STATE OF NEW MEXICO

KENT NOWLIN CONSTRUCTION COMPANY,

Defendant-Petitioner,

vs.

No. 13,914

ESTELA E. GUTIERREZ and MARIA SOTA VDA DE TALAMANTES, as co-personal representatives of the ESTATE OF BERNARDO TALAMANTES, a/k/a HECTOR M. BAYLON, Deceased,

Plaintiffs-Respondents.

Original Proceeding on Certiorari

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SUPREME COURT OF NEW MEXICO
FILED
OCT 25 ...

APPENDIX A

IN THE SUPREME COURT OF THE

STATE OF NEW MEXICO

KENT NOWLIN CONSTRUCTION
COMPANY,

Defendant-Petitioner,

vs. No. 13,914

ESTELA E. GUTIERREZ and MARIA
SOTA VDA DE TALAMANTES, as co-
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SUPREME COURT OF NEW MEXICO
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II.

THE CONSTRUCTION OF THE "EXCLUSIVE REMEDY" PROVISION BY THE MAJORITY OPINION RENDERS THE WORKERS' COMPENSATION ACT UNCONSTITUTIONAL, IN VIOLATION OF THE SUPREMACY CLAUSE, ART. VI, CL. 2, AND THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT 14

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INTRODUCTION

On September 30, 1982, the decision in this case was filed. The majority opinion reversed a unanimous decision of the court of appeals holding that the "exclusive remedy" provision of the workers' compensation act did not bar nonresident alien survivors who have no benefits under the act from pursuing a wrongful death action against the employer whose negligence had caused the death of the plaintiffs' decedent. Two justices dissented from the majority opinion. On October 14, 1982, plaintiffs-respondents filed a motion for rehearing. On October 15, 1982, this Court entered an order granting rehearing and calling for the parties to file briefs addressing the merits of the issues raised in the motion for rehearing.

Plaintiffs-respondents file this Supplemental Brief in support of their position that the majority opinion in this case reached an erroneous construction of the "exclusive remedy" provision of the workers' compensation statute to bar plaintiffs from any remedy whatsoever for the negligent death of their husband and father; that in reaching this harsh result, the majority opinion erroneously disregarded the explicit and opposite construction of the "exclusive remedy" provision in Pedrazza v. Sid Fleming Contractor, Inc., 94 N.M. 59, 607 P.2d 597 (1980); and that the majority opinion's construction of the workers' compensation act renders the act unconstitutional, in violation of the supremacy clause, the due process clause, and equal protection clause.

This Supplemental Brief does not recapitulate the arguments contained in Plaintiffs-Respondents' Answer Brief in the court of appeals and their Brief in Support of Their Motion for Rehearing filed in this Court. Plaintiffs-respondents respectfully refer this Court to those briefs, which

also address the merits of the matters raised in plaintiffs-respondents' motion for rehearing.

I.

THE CONSTRUCTION OF THE "EXCLUSIVE REMEDY" PROVISION OF THE WORKERS' COMPENSATION ACT IN PEDRAZZA V. SID FLEMING CONTRACTOR, INC., IS CONTROLLING. THE MAJORITY OPINION ERRONEOUSLY DISREGARDED PEDRAZZA TO REACH AN INCORRECT CONSTRUCTION OF THAT PROVISION.

The only question addressed by the majority opinion in this cause is whether the "exclusive remedy" provision[1] of the workers' compensation statute, N.M. Stat. Ann. § 52-1-9 (1978), operates to bar plaintiffs' Wrongful Death Act claim, notwithstanding the fact that plaintiffs, as nonresident alien survivors of the decedent, are barred from receiving survivors' benefits under the compensation act. Just two years ago, in Pedrazza v. Sid Fleming Contractor, Inc., 94 N.M. 59, 607 P.2d 597 (1980), this Court addressed that same question in virtually identical circumstances. In Pedrazza, this Court held that while section 52-1-52, barring survivors' benefits to nonresident alien dependents, was not unconstitutional under the fourteenth amendment, 94 N.M. at 62, 607 P.2d at 600, the "exclusive remedy" provision of the compensation act would have no application to such nonresident

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[1]The "exclusive remedy" provision of the workers' compensation act is found in N.M. Stat. Ann. § 52-1-9 (1978), which provides as follows:

> The right to the compensation provided for in this act [52-1-1 to 52-1-69 NMSA 1978], in lieu of any other liability whatsoever, to any and all persons whomsoever, for any personal injury accidentally sustained or death resulting therefrom, shall obtain in all cases where the following conditions occur:
>
> A. at the time of the accident, the employer has complied with the provisions thereof regarding insurance;
>
> B. at the time of the accident, the employee is performing service arising out of and in the course of his employment; and
>
> C. the injury or death is proximately caused by accident arising out of and in the course of his employment and is not intentionally self-inflicted.

alien survivors and therefore would not bar "other avenues of recovery." 94 N.M. at 63, 607 P.2d at 601.

The Pedrazza court's construction of the "exclusive remedy" provision of the compensation act was clear, considered, and explicit. First, the Court made explicit reference to the exclusive remedy provision and held that it would not apply to nonresident alien survivors, not covered under the act:

> It is important to note the exclusive nature and operation of workmen's compensation. If an employer and employee are covered by the Act, all their rights and remedies are defined exclusively by the Act. § 52-1-9, N.M.S.A. 1978. As between the employer and the employee, all other common law and statutory actions are barred by the Act. This bar also applies to the employee's dependents to the extent that they are covered by the Act.

94 N.M. at 61, 607 P.2d at 599 (emphasis added). The Court then went on to recognize explicitly that this construction of the "exclusive remedy" provision would not bar claims like plaintiffs' in this case:

> This opinion does not deny plaintiffs other avenues of recovery. The worker and his dependents are independent of and take separately from one another under the Act. Therefore, the bar against using other legal remedies to recover for the injury or death of a worker cannot be raised against those dependents not covered by the Act.

94 N.M. at 63, 607 P.2d at 601 (emphasis added).

This Court's language in Pedrazza could not have been clearer or more explicit. Moreover, there is no doubt that this construction of the "exclusive remedy" provision was conscious and considered. This conclusion is reinforced by the fact that not only did the Pedrazza court construe the "exclusive remedy" provision of the compensation act as not applying to nonresident alien survivors, who are not covered by the Act, but the Court then went on to recognize explicitly that the application of that construction would allow for the prosecution of other legal remedies "to recover for

the injury or death of a worker." 94 N.M. at 63, 607 P.2d at 601. Finally, the Pedrazza court was fully cognizant of the impact of its construction of the "exclusive remedy" provision on situations like that presented in this case. First, the circumstances in Pedrazza were virtually identical to the circumstances in this case. Second, both plaintiffs and defendant in this case participated in Pedrazza as amicus curiae, thereby making the Pedrazza court aware of the pendency of this lawsuit.

The majority opinion in the present case reached the opposite construction of the "exclusive remedy" provision and held that plaintiffs are barred from prosecuting their wrongful death action and thereby have no remedy whatsoever in New Mexico courts for the negligent death of their husband and father. In reaching this manifestly harsh result, the majority opinion disregarded as dictum the considered construction of the same provision in Pedrazza. The majority opinion, however, failed to analyze the Pedrazza opinion or otherwise explicate its conclusion that the clear and explicit construction of the "exclusive remedy" provision in Pedrazza was dictum. Contrary to the majority opinion's characterization, the Pedrazza court's construction was not obiter dictum and was therefore dispositive of the question decided by the majority opinion in this case. The Pedrazza construction of the "exclusive remedy" provision is controlling because it formed an essential and integral part of the reasoning of the Court in reaching its conclusion and because it was an explicit and considered construction of the statutory scheme at issue in both that decision and the present case.

The binding effect of a precedential decision extends not only to the narrow holding of the decision, but also to the ratio decidendi; that is, the reasoning which is essential to that holding. See, e.g., Beamish v. Beamish, 9

H.C.L. 274, 338-39 (1861) ("The law laid down as your ratio decidendi [is] clearly binding ...."); K. Lewellyn, The Bramble Bush 156-60 (2d ed. 1951) ("[T]he rule follows where its reason leads ...."). The determination in Pedrazza that the "exclusive remedy" provision of the compensation act did not apply to nonresident alien survivors not covered by the act was an essential and integral part of the reasoning of the Court, necessary to its holding and therefore is binding in this case.

In Pedrazza, the plaintiffs challenged as unconstitutional section 52-1-52, N.M. Stat. Ann. (1978), which bars workers' compensation survivors' benefits to nonresident aliens. In reaching its holding that section 52-1-52 did not violate either the due process or equal protection clauses, the Pedrazza court was required to rely on its construction of the "exclusive remedy" provision as not barring nonresident alien survivors.

A critical part of the Pedrazza court's reasoning in determining that section 52-1-52 was not violative of the due process clause was the Court's determination of what interests were being denied to the plaintiffs. The Court predicated its holding that there was no denial of due process on its conclusion that no "fundamental right" was involved. 94 N.M. at 61, 607 P.2d at 599. The Court concluded that because the "exclusive remedy" provision of the compensation act did not bar nonresident aliens from pursuing other remedies, all that was being denied to plaintiffs under the act were their survivors' benefits. The Court held that workers' compensation survivors' benefits did not rise to the level of a "fundamental right" and therefore no due process violation arose from this denial to the plaintiffs.

This construction of the "exclusive remedy" provision of the compensation act is not only essential to, but is the

"linchpin" of, the Pedrazza court's holding of no due process violation. If the Pedrazza court's construction of the "exclusive remedy" provision had been otherwise, the due process issue would have been decided in an entirely different context. To say that depriving an employee's surviving dependents only of workers' compensation benefits is one thing; to say that the survivors are deprived of all remedies is quite another thing. Not only would the issue have changed, but, as argued in point II infra, the result would also have changed. There can be no doubt that the Pedrazza court's construction of the "exclusive remedy" provision formed a vital predicate to the Court's due process holding.

The federal district court in Cole v. University of Hartford, 391 F. Supp. 888 (D. Conn. 1975), employing a similar analysis, construed precedential language as controlling and not obiter dictum. In Cole, the issue was whether the plaintiff, who had brought a civil rights action against the defendant, was required to exhaust remedies before the Equal Employment Opportunity Commission. The plaintiff relied on explicit language from a Second Circuit decision stating that exhaustion was not required. The defendant urged the district court to disregard the precedential language as dictum, since the narrow holding of the precedent went only to affirming the denial of a preliminary injunction. The district court held that the language addressing exhaustion was not dictum because the exhaustion issue was a necessary predicate to finding jurisdiction: "It was necessary for the circuit court to find that exhaustion was not required in order to determine that the federal courts properly had jurisdiction of the case ...." 391 F. Supp. at 890 n.3. Similarly, the Pedrazza court's construction of the "exclusive remedy" provision was not dictum, because it was necessary to the holding that there was no due process violation.

The construction of the "exclusive remedy" provision was equally critical to the Pedrazza court's holding that section 52-1-52 did not violate the equal protection clause. The Pedrazza court explicitly identified section 52-1-52 as "hostile legislation," subjecting nonresident aliens to discriminatory treatment. 94 N.M. at 62, 607 P.2d at 600. The Court held that there was no violation of the equal protection clause on the basis that the Pedrazza plaintiffs, all nonresidents of the United States, could not claim the protection of the equal protection clause. Essential to that holding was the conclusion that under the workers' compensation scheme, the interests and rights of survivors are independent of, and not derivative of, the interests and rights of the worker who is killed in the course of his employment and who is a resident of the United States. In making this determination, the Court looked to the statute as a whole, including the "exclusive remedy" provision. The Court pointed to the "exclusive remedy" provision as one manifestation in the legislative scheme that the statutory rights and interests of survivors are independent of those of the worker, declaring that since their interests are independent, noncovered survivors would not be barred from other remedies by the "exclusive remedy" provision.

The essential nature of that construction to the Pedrazza court's equal protection holding is made clear if a contrary construction is considered. If the Court had construed the "exclusive remedy" provision to be applicable to noncovered survivors, thereby barring them from other remedies, the effect would have been that the workers' compensation statute, as a whole, would have discriminated against nonresident alien survivors by denying to them any remedy and compensation for the negligent death of the worker, while resident survivors would have been eligible for survivors'

benefits under the compensation act. The rights and interests thereby implicated would have included not only the interests in survivors' benefits, which may be independent of the interests of the worker, but also would have implicated the interests of the survivors in a wrongful death action. As argued in point II infra, survivors' interests in a wrongful death action are clearly derivative of the interests of the decedent. As such, the discrimination effected by the statutory scheme would have implicated interests of the resident worker, which his survivors would have standing to raise. Under these circumstances, the Pedrazza plaintiffs could properly raise the violation of the equal protection clause worked against their husband and father.

An analysis of the Pedrazza decision establishes that contrary to the characterization of the majority opinion in the present case, the construction of the "exclusive remedy" provision was not dictum but rather was an integral and essential link in the reasoning of the Court in reaching its holdings. The construction was explicit, repeated, and considered. The United States Supreme Court has recognized that where a prior decision reflects a considered and explicit decision, that decision cannot be considered dictum. See Union Pacific Co. v. Mason City Co., 199 U.S. 160, 166 (1905) ("Whenever a question fairly arises in the course of [an appeal], and there is a distinct decision of that question, the ruling of the court in respect thereto can, in no just sense, be called mere dictum.").

In addressing the constitutional claims raised, the Pedrazza court was faithful to its obligation to construe the statute as a whole. State ex rel. Bird v. Apodaca, 91 N.M. 279, 284, 573 P.2d 213, 218 (1977). This obligation required the Court to construe the "exclusive remedy" provision. The explicit and considered construction of the "exclusive rem-

edy" provision therefore cannot be considered dictum. See Bellar v. National Motor Fleets, Inc., 450 S.W.2d 312, 314 (Tenn. 1970) ("On principle and reason it might very well be postulated that a case construing the particular words of a statute could hardly ever be dictum in a later case involving the same statut[ory] language.").

Even if the Pedrazza court's construction of the "exclusive remedy" provision were considered dictum, the majority opinion in the present case still erroneously disregarded that construction. The majority opinion fails to recognize the distinction between judicial dictum and obiter dictum. Where a judicial decision is germane to the controversy and deliberately passed on by the court, even if not essential to the holding of the court, that decision is judicial dictum and is accorded controlling effect as stare decisis. See, e.g., Beloit Corp. v. Department of Industry, Labor & Human Relations, 63 Wis. 2d 23, __, 216 N.W.2d 233, 238 (1974) ("[T]he discussion of sec. 269.34 was certainly germane to the issue even if not decisive and is therefore not dictum."); Chase v. American Cartage Co., 186 N.W. 598, 599 (Wis. 1922) ("[W]hen a court of last resort intentionally takes up, discusses and decides a question germane to, though not necessarily decisive of, the controversy, such decision is not a dictum, but is a judicial act of the court which it will thereafter recognize as a binding decision."); Crescent Ring Co. v. Travelers' Indemnity Co., 132 A. 106, 107-08 (N.J. Ct. App. 1926) ("There is a decided difference between the two kinds. Obiter dictum is an expression of opinion by the court or judge on a collateral question not directly involved, or mere argument or illustration originating with him, while judicial dictum is an expression of opinion on a question directly involved, argued by counsel and deliber-

ately passed on by the court, though not necessary for a decision.").

The Pedrazza court's construction of the "exclusive remedy" provision must be considered controlling and therefore dispositive of the issue presented in the present case because, even as judicial dictum, it was germane to the decision and reflected the deliberate and considered judgment of the Court. Moreover, Pedrazza was decided less than two years ago, see Cole v. University of Hartford, 391 F. Supp. 888, 890 n.3 (D. Conn. 1975) ("Even if it were dicta, however, this court would be extremely reluctant to depart from an obviously carefully considered conclusion of the Second Circuit that is barely six months old ...."), and arose in a factual setting virtually identical to that presented in this case. See Perfection Tire & Rubber Co. v. Kellogg-Mackay Equipment Co., 187 N.W. 32, 35 (Iowa 1922) ("The binding force of a decision is coextensive with the facts upon which it is founded, and if correlated subject matter is under discussion and decided, such decision is not mere obiter dictum. It is at least a judicial dictum.").

Finally, the Pedrazza court's construction of the "exclusive remedy" provision as not barring nonresident, alien survivors from pursuing other remedies should be followed because that construction is manifestly correct, consonant with the underlying purpose and scheme of the compensation act and avoiding grave constitutional problems which a contrary construction would raise. The sole basis for the majority opinion's holding in the present case that the "exclusive remedy" provision barred plaintiffs from their wrongful death action was that the provision had a "plain meaning" to bar nonresident alien survivors of any remedy and any compensation whatsoever. In construing the statute, however,

the majority opinion fails to analyze the language of the statute, its underlying purpose, or any relevant case law.

Contrary to the majority opinion's characterization, New Mexico case law construing the workers' compensation statute has not found the "exclusive remedy" provision to have a plain meaning or to be all inclusive. In City of Artesia v. Carter, 94 N.M. 311, 610 P.2d 198 (Ct. App.), cert. denied, 94 N.M. 628, 614 P.2d 545 (1980), the court of appeals recently held that the "exclusive remedy" provision of the compensation act neither had a "plain meaning" nor was "all inclusive."[2] In Carter, the court of appeals narrowly construed the language of the "exclusive remedy" provision of the act and held that an action against an employer based on an express contract of indemnity was not barred. There are substantial differences between the claims raised in City of Artesia and those raised in the present case, and plaintiffs do not argue that the holding or reasoning of City of Artesia compels the conclusion urged by plaintiffs here. Rather, the key point of the City of Artesia decision is that it reflects that the language of the "exclusive remedy" provision of the workers' compensation statute is not "all inclusive" and is capable of a narrow construction, allowing for the retention of certain claims against an employer.

Other courts, construing similar statutory provisions in workers' compensation acts, have also found the "exclusive remedy" provision not to have plain meanings or to be all inclusive. See, e.g., Travelers Insurance Co. v. Panama-Williams, Inc., 597 F.2d 702 (10th Cir. 1979); Ransmeier v.

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[2] Carter expressly overruled Gulf Oil Corp. v. Rota-Cone Field Operating Co., 84 N.M. 483, 505 P.2d 78 (Ct. App. 1972). Rota-Cone, employing a "plain meaning" analysis, held that the "exclusive remedy" provision of the act barred actions against the employer based on express contracts of indemnity, reasoning that the language of the "exclusive remedy" provision was "all inclusive," 84 N.M. at 484, 505 P.2d at 79, and therefore barred all claims whatsoever.

Camp Cody, Inc., 378 A.2d 752 (N.H. 1977). Indeed, in Ransmeier, the New Hampshire Supreme Court accorded to its workers' compensation statute a narrow construction, holding that the "exclusive remedy" provision of that statute did not bar a wrongful death action against the employer brought by surviving dependents not covered by the act. 378 A.2d at 753-54.

These cases establish that the "exclusive remedy" provision does not have a plain meaning, is not all inclusive, and is susceptible of a narrow construction. The question therefore becomes whether the Pedrazza court's narrow construction of this provision was correct. Plaintiffs submit that the Pedrazza decision was correct because the narrow construction of the "exclusive remedy" provision of the workers' compensation act is fully consonant with the language, structure, and policies of the act. It is generally recognized that "exclusive remedy" provisions in workers' compensation acts, like New Mexico's, reflect a legislative "tradeoff" of interests. By the compensation system created in the statutory scheme, the legislature created a new, certain, and expedient remedy for employees and imposed it on employers. In consideration for this imposition of new liability on employers, the legislature then gave something to the employer: relief from other types of liabilities for which the new remedy had been substituted. The majority opinion recognizes this analysis.

Larson, the leading authority in the area, describes this "quid pro quo" analysis and how it bears on the proper construction of "exclusive remedy" provision:

> Once a workmen's compensation act has become applicable either through compulsion or election, it affords the exclusive remedy for the injury by the employee or his dependents against the employer and insurance carrier. This is part of the quid pro quo in which the sacrifices and gains of employees and employers are to some extent put in balance, for, while the employer assumes a new lia-

> bility without fault, he is relieved of the prospect of large damage verdicts.
>
> If this is the justification for the exclusive remedy rule, it ought logically to follow that the employer should be spared damage liability only when compensation liability has actually been provided in its place, or, to state the matter from the employee's point of view, rights of action for damages should not be deemed taken away except when something of value has been put in their place.

2(A) A. Larson, The Law of Workmen's Compensation § 65.10, at 12-1 to 12-4 (1982). The language of the "exclusive remedy" provision of the act further supports the "quid pro quo" analysis. Thus, section 52-1-9, N.M. Stat. Ann. (1978), states that the "right to the compensation provided for in this Act [is] in lieu of any other liability." Certainly this language admits of the construction that if there is no "compensation provided in this Act," the remainder of the section will not apply.

The Pedrazza court's narrow construction of the "exclusive remedy" provision is fully supported by this "quid pro quo" analysis of the act. The act gave to beneficiaries of the act an easy and definite compensation (the "quid") in exchange for the beneficiaries' giving up of the more speculative but potentially more rewarding common law and other statutory claims (the "quo"). Under this analysis, it makes little sense to construe the legislative purpose as requiring persons who receive no "quid" to give up their "quo." The Pedrazza court engaged in just this reasoning in concluding that nonresident alien dependents were not barred from bringing wrongful death actions against an employer. Since the act clearly and explicitly precludes the nonresident alien dependents from benefits, the Court could not construe the legislation as requiring these nonresident aliens to relinquish their other claims, having received nothing in return.

In contrast, the construction accorded to the "exclusive remedy" provision by the majority opinion in the present case

attributes to the legislature an intent to encourage employers to hire aliens to the detriment of job opportunities for New Mexico citizens. The message to employers from the majority opinion is clear: It is advantageous to employ aliens whose survivors are nonresidents, because in such situations the employer will be completely insulated from liability in the event the employee is killed in a work-related accident. Not only should this Court not send such a message to New Mexico employers, it certainly should not infer that the legislature compels such a message.

The narrow construction given to the "exclusive remedy" provision by the Pedrazza court is also warranted because such a narrow construction avoids the grave constitutional problems a contrary construction would create. See point II infra. The Pedrazza court's construction was fully consonant with this Court's obligation to construe the statute to avoid constitutional difficulties. See New Mexico State Board of Education v. Board of Education, 95 N.M. 588, 624 P.2d 530 (1981).

The majority opinion's construction of the "exclusive remedy" provision to bar plaintiffs from any redress whatsoever for the negligent death of their husband and father is manifestly harsh and unnecessary. In reaching this harsh result, the majority opinion erroneously disregards as dictum the contrary construction of the statute in Pedrazza. The Pedrazza construction of the statute is not dictum but rather is an explicit, considered, and essential predicate to the Court's holdings. As such, Pedrazza is correct, controlling, and is dispositive of the present case.

II.

THE CONSTRUCTION OF THE "EXCLUSIVE REMEDY" PROVISION BY THE MAJORITY OPINION RENDERS THE WORKERS' COMPENSATION ACT UNCONSTITUTIONAL, IN VIOLATION OF THE SUPREMACY CLAUSE, ART. VI, CL. 2, AND THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT.

The majority opinion construes the "exclusive remedy" provision of the workers' compensation act as barring plaintiffs from pursuing their wrongful death action. The necessary effect of the majority opinion, read together with the Pedrazza opinion, is to construe the compensation act as depriving nonresident alien survivors of any remedy or compensation whatsoever for the negligent death of their husbands, fathers, and providers. This construction of the "exclusive remedy" provision and the compensation act contravenes the United States Constitution in three independent ways. First, the majority opinion's construction contravenes the supremacy clause, U.S. Const. art. VI, cl. 2, in that it construes New Mexico law to be inconsistent with treaty obligations between the United States and Mexico and because it trenches upon the exclusive and plenary power of Congress to regulate immigration to this country, U.S. Const. art. I, § 8, cl. 4. Second, the majority opinion's construction of the statute deprives Mr. Talamantes, plaintiffs' decedent, and plaintiffs of due process, by completely denying any right, remedy, or compensation for the negligent death of Mr. Talamantes. Third, the plainly discriminatory treatment of affording some compensation to U.S. citizens for the work-related death of a breadwinner, but denying any compensation to nonresident alien survivors, contravenes the equal protection clause of the fourteenth amendment.

The Supremacy Clause. The supremacy clause of the United States Constitution provides as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2. The supremacy clause has been construed to come into play and preempt any state statute

which is inconsistent with an explicit or implicit federal treaty obligation.

In Kolovrat v. Oregon, 366 U.S. 187 (1961), the Supreme Court struck down under the supremacy clause a state statute prohibiting nonresident aliens from inheriting property, as conflicting with federal treaty obligations: "[S]tate policies as to the rights of aliens to inherit must give way under our Constitution's Supremacy Clause to 'overriding' federal treaties and conflicting arrangements ...." 366 U.S. at 190. In reaching its holding, the Court rejected a narrow and technical construction by the state court of a treaty between the United States and Yugoslavia, stating that the treaty must be construed liberally to give effect to the purpose of the treaty to ensure free traffic and commerce among the signatory nations. 366 U.S. at 192-93, 194.

The majority opinion's construction of the "exclusive remedy" provision of the workers' compensation statute as barring any compensation and remedy whatsoever to nonresident alien survivors of the worker contravenes solemn treaty obligations between the United States and Mexico. The 1831 Treaty of Amity, Commerce, and Navigation Between the United States of America and the United Mexican States,[3] 8 Stat. 410, clearly establishes that Mexican nationals within the United States of American are to have the same protections of their persons and property as are afforded to United States citizens. Article XIV of the treaty provides:

> Both the contracting parties promise and engage to give their special protection to the persons and property of the citizens of each other, of all occupations, who may be in their territories, subject to the jurisdiction of the one or of the other, transient or dwelling therein ....

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[3]The treaty must be construed liberally to give effect to its stated purpose to establish "most favored nation status" to the signatories, art. III, and to promote free and secure commerce and intercourse between the citizens of the United States of America and the United Mexican States. Art. IV.

(emphasis added). The same article goes on to provide that this "special protection" shall be executed by providing to Mexican nationals "open and free" access to the courts, on equal terms as are afforded to citizens of the United States. The article finally provides:[4]

> [T]he citizens of either party, or their agents, shall enjoy, in every respect, the same rights and privileges, either in prosecuting or defending their rights of person or of property, as the citizens of the country where the cause may be tried.

The majority opinion's construction of the "exclusive remedy" provision and the workers' compensation act conflicts with the explicit and implicit requirements of the 1831 treaty in several ways. First, in construing the statute to completely insulate a negligent employer who causes the death of a Mexican national working in the United States, it can hardly be said that "special protection to the person" of the Mexican national is being afforded. Moreover, in denying to the survivors of the decedent any right to compensation whatsoever, either through survivors' benefits or wrongful death action, the majority opinion construes the compensation act in such a way as to specifically deny to Mexican nationals the same "rights and privileges, either in prosecuting or defending their rights of person or of property,"[5] as United

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[4]It should be noted that while all the other clauses of article XIV of the treaty limit the rights conferred therein to Mexicans within the territorial confines of the United States, this last clause has no such limitation and applies, by its terms, to all Mexican citizens, whether resident or nonresident in the United States.

[5]These "rights and privileges" are further explicated when other treaty obligations and arrangements are referred to. Thus, when the United States and Mexico enter into treaties dealing specifically with certain labor programs, these treaties explicitly provide that "workers admitted under this agreement shall enjoy as regards occupational diseases and accidents the same guarantees enjoyed by domestic workers engaged in similar work under Federal or State legislation in the United States." 1943 Agreement Between the United States of America and Mexico Respecting Recruiting of Mexican Non-Agricultural Workers, art. III(B)(7), 57 Stat. 1356; see also Migrant Labor Agreement of 1951, "Occupational Risks," 2 UST 1987. Moreover, article IX, section 2, of the Convention between the United States and Mexico respecting the duties of consular officers specifically identifies as one of the duties of the consul to collect and receive "on behalf of his non-resident countrymen

States citizens are afforded. The "exclusive remedy" provision of the workers' compensation statute, as construed by the majority opinion, is in conflict with controlling federal treaties and therefore is violative of the supremacy clause.

Even if the majority opinion's construction of the "exclusive remedy" provision did not conflict with specific treaty obligations, it would still violate the supremacy clause, in that the statute, as construed, interferes with the federal government's exclusive and plenary control over immigration policy. The Constitution of the United States of America vests exclusive and plenary authority in the federal government to regulate immigration into the United States. U.S. Const. art. I, § 8, cl. 4; see Takahashi v. Fish & Game Commission, 334 U.S. 410, 419 (1948) (Federal government has "broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms of conditions of their naturalization."). The United States Supreme Court and lower federal courts have held consistently that where a state statutory scheme imposes discriminatory burdens on aliens, such a scheme encroaches on the federal governments power to regulate immigration and therefore is preempted under the supremacy clause. See, e.g., Graham v. Richardson, 403 U.S. 365 (1971); Moreno v. Toll, 489 F. Supp. 658 (D. Md. 1980).

In Graham v. Richardson, the Supreme Court addressed the constitutionality of an Arizona regulatory scheme which de-

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... [benefits] accruing under provisions of so-called Workmen's Compensation Laws or other like statutes." 57 Stat. 800. An analysis of the entire range of treaties and arrangements between the United States and Mexico establishes that it is the intention of the signatory countries that nonresident Mexican nationals would not be deprived of all remedies or compensation for the death of a Mexican worker in the United States, as the majority opinion holds. Rather, these solemn treaty obligations clearly contemplate that nonresident Mexican survivors would be entitled to compensation and would have the ability to pursue their right to compensation through judicial remedy.

nied certain welfare benefits to indigent aliens residing in Arizona. The Court held that the Arizona scheme imposed discriminatory treatment on aliens, requiring a five-year residency period for alien eligibility for benefits, where no such durational eligibility requirement existed for United States citizens. The Court held that this discriminatory treatment trenched on Congress' exclusive power to regulate immigration and therefore violated the supremacy clause: "State laws that restrict the eligibility of aliens for welfare benefits merely because of their alienage conflict with these overriding national policies in an area constitutionally entrusted to the Federal Government." 403 U.S. at 378. Similarly, in Moreno v. Toll, the district court held that a policy of the University of Maryland which precluded nonimmigrant aliens from consideration as in-state students for tuition purposes imposed a discriminatory burden on the aliens. The Court held that this discriminatory burden violated the supremacy clause in that it encroached on Congress' power to regulate immigration. 489 F. Supp. at 668.

The majority opinion's construction of the "exclusive remedy" provision of the compensation act creates just the type of discriminatory burden invalidated in Graham and Moreno. Like the regulatory schemes in Graham and Moreno, the construction of the "exclusive remedy" provision is discriminatory. While resident survivors are afforded some benefits and remedies for the death of the decedent, nonresident aliens are denied all benefits and remedies. Like Graham and Moreno, the discriminatory treatment is based on alienage.[6] Finally, like the schemes in Graham and Moreno, the depriva-

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[6]While section 52-1-52 appears neutral on its face, this Court in Pedrazza explicitly identified the bar to survivors' benefits as "hostile" legislation, 92 N.M. at 62, 607 P.2d at 600. Moreover, this Court, nearly fifty years ago, identified section 52-1-52 as directed at alien workers. Gallup American Coal Co. v. Lira, 39 N.M. 496, 501, 50 P.2d 430, 435 (1935).

tion of any compensation or remedy to alien workers and their survivors imposes a burden on the immigration of alien workers to New Mexico. Graham and Moreno establish that the total and discriminatory deprivation of all compensation and remedy to nonresident alien survivors is violative of the supremacy clause.

Due Process. In Pedrazza, the Court held that section 52-1-52 did not violate the due process clause of the fourteenth amendment, because all that the Pedrazza plaintiffs were deprived of was their survivors' benefits under the compensation act. The Court held that this deprivation was not sufficiently fundamental to violate the due process clause. The majority opinion's holding in this case, extending the deprivation of survivors' benefits only to all compensation and remedy for the negligent death of the worker clearly implicates a fundamental interest[7] and therefore denies to both the alien worker and his survivors due process.

In Boddie v. Connecticut, 401 U.S. 371 (1971), the United States Supreme Court held that access to divorce courts was sufficiently fundamental so that a state regulatory scheme which barred indigents from the divorce courts denied them due process. See also Williams v. Williams, 328 F. Supp. 1380 (D.V.I. 1971) (denying aliens access to divorce courts violates aliens' due process rights). Certainly, if the interest in dissolving a marriage is sufficiently compelling so that deprivation of access to the courts constitutes a due process violation, the total deprivation to nonresident aliens of any remedy for the negligent death of their father, husband, and breadwinner must be equally compelling. Cf. Thompson v. Bond, 421 F. Supp. 878, 882 (W.D. Mo. 1976) ("We

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[7] Due process rights do not turn upon whether the interest implicated by the deprivation is labeled a "right" or a "privilege." See, e.g., Sugarman v. Dougall, 413 U.S. 634, 644 (1977); Goldberg v. Kelly, 397 U.S. 254, 262 (1970).

agree that a state statute, which in broad and unqualified language, deprives all state inmates of the right to file any type of civil action in state court contravenes the constitutional imperative that citizens are entitled to reasonable access to the courts.").

The due process clause of the fourteenth amendment requires that no person may be deprived of "life, liberty, or property, without due process of law." The majority opinion's construction of the "exclusive remedy" provision of the workers' compensation statute sanctions the deprivation of the worker's life and the deprivation of his survivors' property interests without due process of law.

Equal Protection. It is well established that a state regulatory scheme which discriminates invidiously on the basis of alienage violates the equal protection clause of the fourteenth amendment. See, e.g., Plyler v. Doe, 102 S. Ct. 2382 (1982); Graham v. Richardson, 403 U.S. 365 (1971). In Pedrazza, the Court recognized the bar to survivors' benefits pursuant to section 52-1-52 as "hostile" discriminatory legislation based on alienage, but held that there was no equal protection violation because the Pedrazza plaintiffs were not residents of the United States and their interests in the survivors' benefits were independent of, and not derivative of, the deceased worker who was a resident of the United States. The Pedrazza court clearly indicated that had the plaintiffs claimed interests derivative of the resident worker, an equal protection claim would have been established.

The missing element in Pedrazza—an interest in the nonresident alien survivors derivative of the interests of the resident worker—is supplied by the majority opinion's decision in the present case. The majority opinion holds that not only are survivors' benefits to the nonresident alien

survivors barred, but also their wrongful death action is barred. Plaintiffs' interests under New Mexico's wrongful death statute are derivative of and not independent of the interests of the decedent. New Mexico's wrongful death statute is a "survival-type" statute. See, e.g., Natseway v. Jojola, 56 N.M. 793, 800, 251 P.2d 274, 278 (1952). Under "survival-type" statutes like New Mexico's, it is the decedent's own cause of action which is preserved and this type of statute does not create an independent cause of action in the survivors for their injuries. See W. Prosser, The Law of Torts § 902 (4th ed. 1971) ("[S]urvival acts ... proceed upon the theory of preserving the cause of action vested in the decedent at the moment of his death ...."). Therefore, the majority opinion's construction of the "exclusive remedy" provision of the compensation act implicates not only independent interests of the nonresident alien survivors but also implicates interests of the resident alien worker, who clearly can claim the benefits of the equal protection clause.

The effect of the majority opinion in this case is to create two regimes of law concerned with compensation of workers who die in work-related accidents. In some instances, the law provides a remedy for that death and compensation. In other instances, there is no remedy and no compensation. The distinction is based on alienage. The effect of the majority opinion's construction of the compensation act, through sections 52-1-9 and 52-1-52, is to discriminate against aliens by denying to them any remedy or compensation for the negligent death of the decedent.

The United States Supreme Court's recent decision in Plyler v. Doe, 102 S. Ct. 2382 (1982), clearly establishes that the discriminatory treatment accorded aliens under the majority opinion's construction of the workers' compensation

act violates the equal protection clause. In Plyler, the Court held that Texas' refusal to provide public school education to children of illegal aliens could not be justified under the equal protection clause. The Court held that while alienage may not be a "suspect classification" requiring the strictest scrutiny, classification based on alienage requires some special solicitude requiring justification by "some substantial goal of the State." 102 S. Ct. at 2398. In short, the state must come forward and advance some "substantial goal" to justify the discrimination effected.

There are no "substantial goals" of the State of New Mexico which can justify the discrimination effected under the majority opinion's construction of the workers' compensation act to deprive nonresident aliens of any remedy or compensation whatsoever for the negligent death of their husband, father, and breadwinner. Certainly an interest in preserving the financial resources of the employer is constitutionally unavailing. In Plyler, the Court rejected Texas' proffered justification that protecting the public fisc warranted the discrimination. 102 S. Ct. at 2400. Moreover, any justification based on a state's interest in discouraging illegal immigration was also rejected in Plyler, 102 S. Ct. at 2398-2400, and would be similarly unacceptable in this case. Plaintiffs can imagine no legitimate goal of the state which could justify the harsh, hostile, and discriminatory treatment of aliens created by depriving them of all remedy and compensation for the negligent death of the decedent. Plyler requires the conclusion that the workers' compensation act as construed by the majority opinion violates the equal protection clause of the fourteenth amendment.[8]

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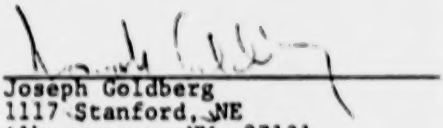
[8] If this Court should determine not to address the constitutional problems raised by the majority opinion in this case, plaintiffs respectfully suggest that this Court should take this opportunity to reexamine the Pedrazza holding that section 52-1-52 does not violate the due pro-

CONCLUSION

For all the above reasons, plaintiffs-respondents respectfully request that this Court withdraw the majority opinion filed on September 30, 1982, and enter a new opinion affirming the decision of the court of appeals.

Respectfully submitted,



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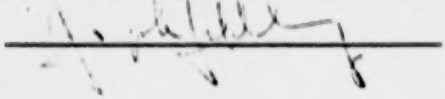

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cess or equal protection clauses of the fourteenth amendment. As discussed in points I and II above, the "linchpin" of the Court's decision in Pedrazza was its conclusion that the only compensation denied to nonresident aliens under the workers' compensation act was survivors' benefits. This conclusion ramified the Court's reasoning as to both the due process and equal protection claims. The elimination by the majority opinion in this case of that essential element to the Pedrazza court's analysis requires reexamination of the holding. Moreover, since the majority opinion holds that plaintiffs are denied their wrongful death claim, plaintiffs have standing to raise the constitutional violations, since there are now interests of the resident worker which are implicated by the discrimination effected through the workers' compensation statute.

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

KENT NOWLIN CONSTRUCTION COMPANY,

Defendant-Petitioner,

vs. No. 13,914

ESTELA E. GUTIERREZ and MARIA SOTA VDA DE TALAMANTES, as co-personal representatives of the ESTATE OF BERNARDO TALAMANTES, a/k/a HECTOR M. BAYLON, Deceased,

Plaintiffs-Respondents.

PETITIONER'S SUPPLEMENTAL BRIEF ON REHEARING

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SUPREME COURT OF NEW MEXICO
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ARGUMENTS AND AUTHORITIES

INTRODUCTION

The respondents' argument in this rehearing is based upon their erroneous belief that the last paragraph of this Court's opinion in Pedrazza v. Sid Fleming Contractors Inc., 94 N.M. 59, 607 P.2d 597 (1980) is dispositive of the issue as to whether or not the Workmen's Compensation Act provides the exclusive remedy for respondents in this case. It is not. What is dispositive is the clear, unambiguous legislative mandate set forth in § 52-1-9 NMSA 1978:

> The right to the compensation provided for in this act [52-1-1 to 52-1-69 NMSA 1978], in lieu of any other liability whatsoever, to any and all persons whomsoever, for any personal injury accidentally sustained or death resulting therefrom, shall obtain in all cases where the following conditions occur:
>
> A. at the time of the accident, the employer has complied with the provisions thereof regarding insurance;
>
> B. at the time of the accident, the employee is performing service arising out of and in the course of his employment; and
>
> C. the injury or death is proximately caused by accident arising out of and in the course of his employment and is not intentionally self-inflicted.

Nowhere do the respondents claim that the petitioner/employer had not complied with the provisions of the Workmen's Compensation Act, nor do they claim that at the time of the accident, the deceased workman was performing service arising out of and in the course of his employment. There is also no contention that the injury or death was not proximately caused by an accident arising out of and in the course of the employment. The three conditions of § 52-1-9 were met, and the inescapable conclusion, as a matter of law, must be that there is no right, on the part of any person whomsoever, to bring any

action whatsoever against the employer (the petitioner here) for wrongful death.

The last paragraph of Pedrazza, in which respondents place so much faith, is clearly dictum, as that term has been defined by this Court. The paragraph is not controlling in this case, particularly in light of the clear language of § 52-1-9, and this Court's prior decisions holding that § 52-1-9 means precisely what it says.

POINT I. THE LAST PARAGRAPH OF PEDRAZZA IS CLEARLY DICTUM, AND NOT A CONTROLLING STATEMENT OF LAW.

Respondents devote many pages of their brief to attempting to show that the last paragraph of Pedrazza is not dictum, or, if it is, that it is nevertheless "judicial" dictum rather than "obiter" dictum, and therefore is binding upon this Court in the present case. A review of the appellate pleadings in Pedrazza, however, clearly demonstrates that the final paragraph in that case is dictum, and was not necessary to the resolution of the single issue then before the Court.

In Rocky Mtn. Life Ins. Co. v. Reidy, 69 N.M. 36, 363 P.2d 1031 (1961), this Court held that language in a prior case "was dictum unnecessary to the decision of the issues before the court in that case and, accordingly, not binding as a rule of law." 69 N.M. at 40. More recently, in Portillo v. Shappie, 97 N.M. 59, 636 P.2d 878 (1981) the court considered the question of whether language in previous cases was binding upon it. The court there noted that where an issue was not presented for review, any language regarding the resolution of that issue was unnecessary for the decision, and was therefore dictum, and not controlling in a subsequent case.

What, then, were the issues presented to the Court in Pedrazza? An examination of the opinion in that case, together with the briefs of the parties and amici curiae, makes it clear that there was only one question presented, and that was whether or not § 52-1-52 NMSA 1978 was constitutional. To quote from the appellants' Brief-in-Chief in Pedrazza:

> There is but one issue for consideration. That is, whether 52-1-52 of the New Mexico Statutes, 1978 edition, is constitutional.

Appellant's Brief-in-Chief, Pedrazza v. Sid Fleming Contractor, Inc, et al., No. 12389, pg. 2. The question of exclusivity of the Workmen's Compensation Act, or the availability of other

remedies, was simply not presented to the Supreme Court in Pedrazza, and the language in the Pedrazza opinion dealing with the availability of other remedies is clearly dictum.

This Court has previously held that a discussion of other possibly available remedies contained in an opinion where that question was not raised on the appeal itself is dictum and not binding. State v. District Court of Eighth Judicial District, 79 N.M. 33, 439 P.2d 551 (1968). This Court in State v. District Court was considering the opinion in State ex rel. Truitt v. District Court of Ninth Judicial District, 44 N.M. 16, 96 P.2d 710 (1939) and in connection with the Truitt opinion, it held that:

> However, the lengthy opinion contains various statements that were not necessary for that decision. The case sought reformation and, under the facts there present, constituted an action in personam. Thus any discussion in the opinion of other types of action was dicta and will not be considered as binding upon us.

79 N.M. at 35. The Pedrazza opinion is similar to Truitt--it went beyond the question presented, and discussed whether or not other remedies might be available. That discussion of other remedies was dictum, and is not a controlling statement of the law in this state.

Respondents argue that the question of other remedies was necessary to the resolution of the constitutionality issue respectively § 52-1-52 because it was part of the ratio decidendi of the Pedrazza opinion--in effect, respondents construe Pedrazza as saying that the only reason § 52-1-52 is not unconstitutional is that there are other remedies available. Even a cursory reading of Pedrazza, however, reveals that that is not the case.

In Pedrazza, § 52-1-52 was attacked on two grounds, due process and equal protection. This Court found that the due process clause was not violated because there was no property interest in workmen's compensation benefits vested in those non-resident dependents, and if there are no property rights, then there is no deprivation of property without due process of law. The "due process" part of the opinion had nothing whatsoever to do with the availability of other remedies. It simply held that there was no deprivation of property, and thus there could be no due process violation in dismissing the suit.

The equal protection part of the Pedrazza decision also was not based upon availability of other remedies. It, rather, was based upon the holding of the United States Supreme Court in Johnson v. Eisentrager, 339 U.S. 763, 771, 70 S.Ct. 936, 940, 94 L.Ed. 1255 (1950). Johnson makes the point that the equal protection of the laws extends to those persons within the territorial jurisdiction of the state. The plaintiffs in Pedrazza, like the respondents here, were admittedly not persons within the territorial jurisdiction of this state or the United States, and the equal protection clause therefore is inapplicable.

Far from being the "linchpin" of this Court's opinion in Pedrazza, the language with respect to other remedies was simply dictum, unnecessary to resolution of any issue presented to the Court in Pedrazza. Deleting the last paragraph of Pedrazza would have no effect whatsoever on the ruling on the question before the Court in that case, or on the reasoning underlying the opinion.

The respondents are now, in effect, saying that if § 52-1-52 is constitutional, as was determined in Pedrazza,

then § 52-1-9 must have been found, in Pedrazza, to be unconstitutional. It would have this Court determine that it decided the constitutionality of a statute in one paragraph of an opinion on an appeal in which that question was not even raised. Respondents argue that this must be the case, or else further, more serious constitutional questions are presented by § 52-1-9. That is not in fact the case, as will be demonstrated below, but it is significant to note that the interpretation of Pedrazza urged by respondents would in fact discriminate against all resident dependents of workmen killed in the course and scope of their employment. Respondents' argument, if true, would mean that a non-resident dependent could file a wrongful death action, with the theoretically unlimited potential recovery available in such an action, while the resident dependent is always relegated to his or her statutorily fixed workmen's compensation benefits. In effect, respondents argue that § 52-1-9 should be made non-discriminatory by discriminating against resident dependents. This would be clearly in violation of the New Mexico Constitution. State v. Martinez, 48 N.M. 232, 149 P.2d 124 (1944).

It should also be noted that, even if Pedrazza were controlling, it would not in fact change the results in this case. Workmen's compensation benefits were paid pursuant to § 52-1-46 NMSA 1978. Moreover, these dependents are "covered" by the act, so the last paragraph of Pedrazza would not apply. The Legislature made a specific determination as to who is entitled to workmen's compensation benefits, and who is not, in specifically referring to this situation in § 52-1-52. Non-resident dependents, whether they are citizens of New Mexico or the United States or citizens of another country, are all

treated the same, and their situation is no different from others who might, in a non-workmen's compensation context, have a right to recover damages for wrongful death, but who, in the context of a workmen's compensation action, are barred from recovery. For example, consider a situation in which a workman is killed on the job, and, if not for the bar of § 52-1-9, his employer would be liable in a wrongful death action. Assume further that the workman had no dependents, as defined in § 52-1-17 NMSA 1978, but that he does have a brother and a sister. Under the Wrongful Death Act, § 41-2-1 et seq., NMSA 1978, the brother and sister would be entitled to share in the proceeds of the wrongful death action brought by the personal administrator, in the same way as these respondents seek to share in the proceeds of a wrongful death action. Under the workmen's compensation action, the brother and sister in the hypothetical example would be barred from any recovery against the employer. That result may seem harsh, but such a result has in fact been upheld as a valid exercise of the Legislature's discretion in determining beneficiaries under workmen's compensation acts. See, e.g., Thol v. U.S., 218 F.2d 12 (9th Cir. 1954); Horney v. Meredith Swimming Pool Co., 267 N.C. 521, 148 S.E.2d 554 (1966); Maiuri v. Sinacola Construction Co., 382 Mich. 391, 170 N.W.2d 27 (1969); Gregutis v. Waclark Wire Works, 91 Atl. 98 (N.J. 1914). Cf. Gallegos v. Homestake Mining Co., 97 N.M. 717, 643 P.2d 281 (Ct. App. 1982).

Non-resident dependents form a similar class of persons who would be entitled to recover in a wrongful death action absent the workmen's compensation act, but who are not entitled to recover under the Workmen's Compensation Act, because the Legislature has determined that the purposes of the act are not furthered by permitting such recovery. As noted in

petitioner's Reply Brief in this case, filed in the Court of Appeals, at page 3, "the philosophy underlying any workmen's compensation statute is to keep an injured workman and/or his dependents off the welfare rolls. 1 Larson's Workmen's Compensation Law § 2.20." In Lane v. Levi Strauss & Co., 92 N.M. 504, 590 P.2d 652 (Ct.App. 1979), it was held that ". . . the purpose of the workmen's compensation law is to prevent . . . [an employee] and his dependents from becoming public charges during the period of disability." Non-resident dependents would not become public charges, and therefore the Legislature excluded them from the right to recover benefits under the act. To construe Pedrazza as respondents urge would reverse that legislative determination, and be counter to the legislative purpose.

A secondary purpose of the workmen's compensation laws is noted in Sanchez v. Hill Line, Inc., 123 F.2d 42 (10th Cir. 1954). The court there, applying New Mexico law, noted that the purpose of workmen's compensation laws is to provide not only for employees a remedy which is both expeditious and independent of proof of fault, but also for employers a liability which is limited and determinate. If non-resident dependents are found to have an additional cause of action above and beyond that of resident dependents or any one else who could make a claim for the death of an injured workman, then this purpose of the workmen's compensation laws would be effectively destroyed. There would no longer be a fixed and determinate liability for employers, although the employee would still have his expeditious remedy, independent of proof of fault.

This Court recognized in Dickson v. Mtn. States Mutual Casualty Co., N.M. State Bar Bulletin, Vol. 21, No. 35, pg. 1084 (1982) that the workmen's compensation law is the

product of a balancing of various interests by the Legislature, and it went on to note in that case that:

> General exclusivity of the New Mexico Workmen's Compensation Act has been litigated in this state. The decisions have uniformly held that the employer or insurer's liability is limited to that set forth in the act.

That considered balancing of interests by the Legislature should not be overruled by this Court by holding that certain dependents are in fact entitled to maintain a wrongful death action against the employer, notwithstanding the exclusivity provisions of the Workmen's Compensation Act.

Despite the line of case law in New Mexico holding that the remedies of the Workmen's Compensation Act are exclusive, from Roseberry v. Phillips Petroleum Co., 70 N.M. 19, 369 P.2d 403 (1962) through Dickson, supra, respondents urge that such a strict construction need not be given to § 52-1-9, and point to the case of Ransmeier v. Camp Cody, Inc., 378 A.2d 752 (N.H. 1977) as support for that argument. It is significant to note, however, that even the New Hampshire court recognized in that opinion that its exclusionary clause was extremely narrow, and was in fact different from the law of those states which bar actions by anyone against the employer when the employee suffers a compensible injury. 378 A.2d at 753. New Mexico has a statute of the latter type and its bar against any action whatsoever by any persons whomsoever should be again upheld.

In short, § 52-1-9 is clear, unambiguous, and has been consistently recognized by the courts of this state as meaning exactly what it says--that when the worker receives a compensible injury, meaning that he was injured on the job, in the course and scope of his employment, no person whomsoever may bring any action whatsoever against the employer other than

that provided for in the Workmen's Compensation Act. The language in Pedrazza, to the extent it implies a contrary result, is simply dictum, and not controlling on this point.

POINT II. THE EXCLUSIVITY PROVISIONS OF §§ 52-1-9 and 52-1-52 ARE CONSTITUTIONAL.

The opinion of this Court from which respondents seek a rehearing passes constitutional muster in all respects. It does not violate the supremacy clause of the United States Constitution, nor does it violate any rights to due process of law or equal protection. In large part, it seems that the respondents are attempting to reargue the constitutional questions presented in Pedrazza with respect to § 52-1-52. The opinion in Pedrazza on those points, however, stands on solid constitutional foundations and the addition of § 52-1-9 to the questions presented does not change the result.

A. SECTION 52-1-9 DOES NOT VIOLATE THE SUPREMACY CLAUSE.

Respondents argue that the result in this case conflicts with treaties between the United States and Mexico, and thus violates the supremacy clause of the United States Constitution. An examination of the treaties themselves, together with the case law, shows that that is not the case.

As a starting point, it must be borne in mind that every statute carries with it a presumption of constitutionality. McGeehan v. Bunch, 88 N.M. 308, 540 P.2d 238 (1975); Alaska Packers Ass'n. v. Industrial Accident Commission, 294 U.S. 532, 55 S.Ct. 518, 79 L.Ed. 1044 (1934). The burden is therefore on respondent to show that § 52-1-9 is in fact unconstitutional. Respondents have failed to carry this burden.

The treaty with Mexico states, as noted by respondents, that citizens of Mexico are to have access to the courts of the United States "on the same terms which are usual and customary with the natives or citizens" of the United States, and that they "shall enjoy, in every respect, the same rights and privileges, either in prosecuting or defending their rights

of person or of property, as the citizens of the country where the cause may be tried." That same Article XIV, however, also states that the "special protection," referred to but not explained by respondents, applies to Mexicans in the United States and United States citizens in Mexico. It does not apply to Mexicans residing in Mexico, or to United States citizens residing in the United States. The key point here is that the respondents in this case are in fact citizens and residents of Mexico, and not of the United States.

Even if that preliminary requirement were met, however, the question still arises as to in what way these respondents are being denied any right available to a citizen of the United States, and the answer is that there is no such deprivation. A United States citizen who is not a resident of the United States would have no right to dependents' benefits under our workmen's compensation statute pursuant to § 52-1-52 and, by virtue of § 52-1-9, no right to any other action against the employer. The statute is not concerned with the residence or citizenship of the worker who is injured, but rather with the residence (not nationality) of the dependent. Whether the worker is a citizen of the United States, or of Mexico, or of any other country is irrelevant insofar as benefits payable to the dependents are concerned. It is the residence of those dependents which is the focus of the statute (§ 52-1-52) and non-residents, regardless of citizenship, are all treated exactly the same. The treaty only provides that citizens of Mexico are entitled to the same rights and benefits as citizens of the United States, but it does not say that they are entitled to any more. Under § 52-1-9, and § 52-1-52, there is no unequal treatment of dependents based upon citizenship. The law applies equally to U.S. citizens or Mexican nationals.

There is, similarly, no conflict between the New Mexico Workmen's Compensation Act and the treaty with respect to non-agricultural workers dated April 29, 1943. That treaty, by its terms, applies to non-agricultural workers who enter this country legally under contract, and the deceased was not in that group.

There is no conflict between the New Mexico statute and any treaty with Mexico, and there is no supremacy clause violation. No resident of the United States has a right to recover damages from the employer other than those set forth in the Workmen's Compensation Act, and neither does a citizen of Mexico. Section 52-1-9 applies equally to all persons of whatever residence or nationality, and there is therefore no violation of any treaty with Mexico.

To the extent respondents wish this Court to overturn the ruling in Pedrazza on supremacy clause grounds, it is significant to note that those few cases which have dealt with this question have uniformly rejected the contention that there is any such constitutional conflict. In Madonna v. Wheeling Steel Corp., 28 F.2d 710 (4th Cir. 1928), cert. den. 279 U.S. 838 (1928), the court dealt with a West Virginia statute similar to New Mexico's in that it denied dependent's benefits to dependents residing outside of the United States. The court found that this did not conflict with the United States treaty with Italy which, like that with Mexico, stated that citizens of Italy shall enjoy the same rights and privileges as are granted to United States citizens. The Fourth Circuit noted that citizens of the United States, who were dependent, but who resided outside the United States, would not be entitled to any compensation, and that is exactly the situation with the New Mexico statute. Accord, see Micaz v. Compensation Commissioner, 123 W.V. 14, 13 S.E.2d 161 (1941); Norella v. Maryland

Casualty Co., 216 Ken. 29, 287 S.W. 18 (1926). Section 52-1-9 applies equally to all nationalities, Mexican, United States, Canadian, or anything else. There is no violation of the treaty with Mexico, and there is no violation of the supremacy clause.

Similarly, there is no violation of the supremacy clause because § 52-1-9 allegedly interferes with the federal government's exclusive power to regulate immigration. Section 52-1-9 makes no distinction between legal or illegal immigrants, or between citizens of one nationality or citizens of another. All employees, and their employers, are treated equally, regardless of nationality. The statute does not, as respondents state on page 19 of their brief, act to discriminate on the basis of alienage of dependents, but rather on the basis of residence, regardless of the nationality of the dependents. The statute is completely neutral insofar as alienage goes, and has no effect on immigration or naturalization.

B. THERE IS NO VIOLATION OF "DUE PROCESS" IN THE APPLICATION OF § 52-1-9.

Respondents mischaracterize the holding in Pedrazza insofar as due process is concerned. Pedrazza did not hold that due process was not violated because the plaintiffs were only deprived of their survivor's benefits under the Workmen's Compensation Act; rather, it held that there was no property right involved, and so therefore there was no deprivation of any property without due process of law. This Court was specific on that point, holding that, "The Legislature conferred no due process property right upon the plaintiff which the district court could have violated by dismissing plaintiff's suit."

There is no "fundamental right" involved in this action. The United States Supreme Court in San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973) articulated a firm rule: fundamental rights are those that "explicitly or implicitly [are] guaranteed by the Constitution." 411 U.S. at 33-34, 93 S.Ct. 1296-1297; Plyler v. Doe, ____ U.S. ____ 102 S.Ct. 2382, 2403 (1982). Regardless of whether the right is thought to be of social or economic importance, it is not a "fundamental right" within the meaning of the Constitution unless it is actually set forth, either explicitly or implicitly, in the Constitution of the United States. The right to receive workmen's compensation benefits is nowhere so established. Neither is the right to bring a wrongful death action, which is, in fact, in a creature of statute, and in derogation of the common law. Cain v. Rowlby, 114 F.2d 519 (10th Cir. 1940), cert. den. 311 U.S. 710 (1940).

The Fourteenth Amendment states that no person may be deprived of "life, liberty or property, without due process of law." The question which respondents do not answer is what property they have been deprived of. The right to receive workmen's compensation benefits is not "property" and these respondents were not denied life or liberty by § 52-1-9.

C. SECTION 52-1-9 PROVIDES "EQUAL PROTECTION OF THE LAW."

The question as to whether the limitation of the particular dependents to whom workmen's compensation benefits can be paid, and whether or not the limitations violate equal protection, was addressed in Gallegos v. Homestake Mining Co., 97 N.M. 717, 643 P.2d 281 (Ct.App. 1982). There, the parents of a deceased workman were found not to be dependents, and therefore not entitled to workmen's compensation benefits.

Although § 52-1-9 was not specifically addressed, the case is analagous to the present one, in that persons who in a wrongful death proceeding would be entitled to recover benefits, were not entitled to recover any compensation because of the limitations contained in the Workmen's Compensation Act. The Court of Appeals, through Judge Donnelly, noted that the classification fixed by the Legislature does not violate the principle of uniformity, or of equal protection of the laws, if it has a reasonable basis, or rational justification. The burden is on the party challenging the statute to show that it is clearly arbitrary and unreasonable, and not just possibly arbitrary, and not just possibly unreasonable. The Court of Appeals held, moreover, that under the doctrine of separation of powers, courts may not inquire into statutory policy and may not substitute their views in the formulation of legislative provisions or classifications for those of the Legislature. The test employed in Gallegos is that set out by Justice McManus in Espanola Housing Authority v. Atencio, 90 N.M. 787, 568 P.2d 1233 (1977). There, it was held that:

> When an equal protection challenge is leveled against a legislative classification, this court considers the guidelines set forth in Davy v. McNeill, 31 N.M. 7, 14, 240 P. 482, 486 (1925): "If the classification is reasonable, it is valid. It is in the first instance a legislative question as to whether or not the classification is reasonable; that is, could it have seemed reasonable to the Legislature even though such basis seems to be unreasonable, or is it arbitrary and unjust?"

As noted above, it has been held that one of the purposes of the Workmen's Compensation Act is to keep surviving dependents off the welfare rolls of this state. Exclusion of benefits to those who are not even residents of this country would seem to be a reasonable means of achieving that end, as does the exclusion of parents or siblings residing here who are not dependents. The classification is reasonable.

That § 52-1-9 does not violate the equal protection clause with respect to these respondents is also made clear by this Court's decision in Pedrazza. There, the Court noted that, in conformity with Johnson v. Eisentrager, 339 U.S. 763, 771, 70 S.Ct. 936, 940, 94 L.Ed. 1255 (1950), the equal protection clause applies only to persons within the territorial jurisdiction of the state. This rule was affirmed most recently by this year's Supreme Court decision in Plyler v. Doe, supra, a case relied upon by respondents. These respondents reside in Mexico--they are not subject to the territorial jurisdiction of New Mexico, and therefore have no claim of a violation of equal protection of the laws of this state. Nor do they have a complaint with respect to equal protection of the laws of the United States, because they are also not within the territorial jurisdiction of the United States of America.

Even if the equal protection clause did apply, these respondents have not yet explained how they are treated any differently than any other person appearing before a court of this state. No person, whether a citizen of the United States, of Mexico, or of anywhere else, has a right to bring any action, except for workmen's compensation, against an employer which stems from an injury to an employee in the course and scope of his employment. To allow non-resident dependents to bring such an action would in fact be a violation of equal protection for all of those dependents who reside in the United States, in violation of the rule set forth in State v. Martinez, 48 N.M. 232, 149 P.2d 124 (1944).

If this Court determines that § 52-1-9 violates the equal protection clause, it cannot logically limit its holding to non-resident dependents, but will also have to take into account those persons, such as the plaintiffs in Gallegos v.

Homestake Mining Co., who also are barred by the statute from receiving benefits as dependents, and who have no other rights of action against the employer because of the bar of § 52-1-9. It would have to substitute its judgment as to the persons to receive benefits under the Workmen's Compensation Act for that of the Legislature, and in so doing substitute its judgment for that of the Legislature as to how to best further the goals to be accomplished by the Workmen's Compensation Act. That it should not do.

Applying § 52-1-9 in this case does lead to a harsh result. These dependents, resident in Mexico, and not in the United States, are barred from any recovery for the death of the deceased workman except for medical expenses and funeral benefits, which were in fact paid. The perceived "harshness", however, does not make the statute unconstitutional. If the result is harsh, the remedy lies with the Legislature, and not with the Courts.

POINT III. IF THIS COURT DETERMINES THAT § 52-1-9 IS NOT APPLICABLE IN THIS SITUATION, IT SHOULD CONSIDER THE OTHER POINTS RAISED ON APPEAL.

Respondents complain that this Court decided this case in seven sentences, and that more consideration should have been given to their other arguments below. Petitioner believes that seven sentences are more than adequate for this Court to take an unambiguous statute, such as § 52-1-9, and apply it to the facts of this case to determine that there was in fact no right to bring an action for wrongful death against the employer. That decision was correct, and should stand. In the event this Court should reverse itself on that point, however, petitioner respectfully requests that the Court consider the other arguments raised by the Petition for Certiorari. If the judgment of the district court is not reversed, the case should be remanded for a new trial. By reason of § 52-1-9, the first trial was unnecessary, and this Court was correct in so holding. In the event the Court finds that § 52-1-9 is subject to exception, petitioner is entitled to a new trial for those reasons set forth in its Petition for Certiorari and the briefs filed in connection with this appeal.

CONCLUSION

This Court's original opinion in this matter is in complete accord with the precedence established by the case law of this state, and with the clear and unambiguous legislative mandates set forth in § 52-1-9. The Motion for Summary Judgment should have been granted at the trial court level, and this Court should adhere to the opinion it has already issued in this proceeding.

Respectfully submitted,

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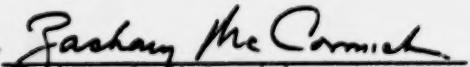
By 

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No. 82-6614

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

ASTRID GALINDO SARDOZ and MARIA SOTO VDA. DE TALAMANTES as co-personal representatives of the Estate of BERNARDO TALAMANTES, a/k/a HECTOR M. BAYLON, deceased,

Appellants,

vs.

KENT NOWLIN CONSTRUCTION COMPANY,

Appellee.

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of June, 1983, a copy of the foregoing Appellants' Brief in Opposition to the Motion to Dismiss or Affirm was mailed with first class postage prepaid to Peter J. Adang, Counsel of Record for Defendant, at Modrall, Sperling, Roehl, Harris & Sisk, PO Box 2168, Albuquerque, NM 87103 and to the Attorney General of the State of New Mexico, Paul Bardacke, PO Drawer 1508, Batann Memorial Building, Santa Fe, NM 87503.

Respectfully submitted,

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